



# ASILE

Global Asylum  
Governance and  
the European  
Union's Role

## Catalogue of International and Regional Legal Standards

Refugee and Human Rights Law  
Standards Applicable to Asylum  
Governance

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October 2021

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This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement n° 870787. This document reflects only the author's view and the Commission is not responsible for any use that may be made of the information it contains.

## TECHNICAL REFERENCES

Deliverable No.	D3.1
Dissemination level*	PU
Workpackage	3
Lead beneficiary	Aarhus University
Contributing beneficiary/ies	CEPS
Due date of deliverable	30 November 2020
Actual submission date	9 May 2021 / 7 October 2021
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\* PU = Public

PP = Restricted to other programme participants (including the Commission Services)

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\* Nikolas Feith Tan has been in charge of drafting sections 1, 2 and 4 while Jens Vedsted-Hansen has been in charge of sections 3 and 5.

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## LIST OF ABBREVIATIONS

<b>ACHR</b>	American Convention on Human Rights
<b>ACHPR</b>	African Charter on Human and Peoples' Rights
<b>CAT</b>	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>CEAS</b>	Common European Asylum System
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>CERD</b>	Convention on the Elimination of all Forms of Racial Discrimination
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>CRC</b>	Convention on the Rights of the Child
<b>CUP</b>	Cambridge University Press
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>EMN</b>	European Migration Network
<b>ETS</b>	European Treaty Series
<b>EUCFR</b>	Charter of Fundamental Rights of the European Union
<b>GCR</b>	Global Compact on Refugees
<b>IACHR</b>	Inter-American Court of Human Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>OUP</b>	Oxford University Press
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UNTS</b>	United Nations Treaty Series

# 1 INTRODUCTION

## 1.1 Context

This working paper sets out those international and regional legal standards of relevance to international asylum governance and policies of containment and mobility. The working paper's primary purpose is providing a state-of-the-art overview of legal standards drawn from international and regional conventions on human rights and refugee instruments. In particular, the working paper focuses on those standards governing the asylum governance of six countries central to the ASILE project, Bangladesh, Brazil, Canada, Jordan, South Africa and Turkey.

In terms of normative scope, the working paper primarily presents binding instruments of international and regional law in the area of asylum governance. As a legal doctrinal undertaking, the working paper maintains a strict dichotomy between binding and non-binding instruments.<sup>1</sup> However, non-binding instruments and sources are identified where they aid interpretation or application of hard law standards. In particular, non-binding standards, such as UNHCR guidance, are relied upon where they reflect the use of national and regional courts as interpretative tools when assessing the legality of national asylum governance laws and policies.<sup>2</sup>

The working paper is primarily concerned with those international and regional human rights and refugee law standards that relate to the *legal processes core to asylum governance*. By this, we mean those legal procedures and standards most closely connected to the grant and content of international protection, including access to asylum, asylum procedures, scope of international protection and content of international protection. As a result, we do not focus on standards relating to reception conditions, including detention standards. The working paper further draws on relevant case-law to illustrate the application and scope of particular standards, with a focus on the six countries where possible.

The working paper is further set against the background of the Global Compact on Refugees, a non-binding instrument grounded in the international refugee regime, most notably the 1951 *Convention on the Status of Refugees* ('Refugee Convention') and its 1967 Protocol.<sup>3</sup> The Global

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<sup>1</sup> As set out in Article 38(1) of the Statute of the International Court of Justice. The Statute identifies three primary sources: international conventions, international custom, and general principles of law; and two secondary sources: judicial decisions and the teachings of pre-eminent jurists.

<sup>2</sup> See, for example, Section 3.1 below. For Country Fiches providing a profile of asylum governance and Country Notes providing an overview of key issues and recommendations on international protection put forward by regional and international human rights mechanisms in the six countries central to the ASILE project, see the ASILE Global Portal available at <https://www.asileproject.eu/asile-global-portal/>.

<sup>3</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)

Compact on Refugees (GCR) aims to provide a ‘basis for predictable and equitable burden- and responsibility-sharing’ for refugees globally.<sup>4</sup>

In terms of substantive scope, the working paper is guided by two fundamental concepts underpinning the ASILE project. First, the working paper catalogues international and regional standards against the background of practices of ‘*containment*’, used here to refer to instruments and arrangements aimed at preventing access, reducing admission and increasing the expulsion of asylum seekers to countries of transit or origin.<sup>5</sup> Second, the working paper refers to ‘*mobility*’ in terms of third country solutions for refugees provided for in the GCR as ‘resettlement and complementary pathways to admission’.<sup>6</sup> Third country solutions are conceived of in the GCR as a range of controlled admission channels for refugees. In general, these third country solutions are matters of policy and not directly governed by binding international or regional law standards.<sup>7</sup>

Resettlement is one of the three internationally recognised durable solutions allowing for responsibility-sharing brokered by UNHCR.<sup>8</sup> Resettlement involves the ‘transfer of refugees from one State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status’.<sup>9</sup> The GCR seeks to leverage and expand UNHCR’s resettlement programme both through the expansion of existing resettlement quotas and the development of new resettlement countries.<sup>10</sup> International law relating to resettlement has recently been characterised as a ‘legal abyss’, and there exists no right to be resettled under international or regional refugee law or human rights law.<sup>11</sup> While the EU Commission has proposed the creation of a Union Resettlement Framework,<sup>12</sup> which would import relevant

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<sup>4</sup> Global Compact on Refugees (UN doc. A/73/12 (Part II), affirmed by Resolution 73/151 of the UN General Assembly, adopted 17 December 2018), para 3.

<sup>5</sup> These practices include restrictive visa requirements, carrier sanctions, the use of the ‘safe third country’ and ‘safe country of origin’ concepts, readmission agreements and arrangements, and interdictions at sea. It includes the range of practices, which aim at preventing refugees from fleeing beyond countries in the immediate vicinity of conflict and persecution, and consequent concentration of refugees in the Global South, where they often endure protracted human rights restrictions.

<sup>6</sup> Complementary pathways have been defined by UNHCR as ‘safe and regulated avenues for refugees that complement resettlement by providing lawful stay in a third country where their international protection needs are met.’ UNHCR, *Complementary Pathways for Admission of Refugees to Third Countries: Key considerations*, (2019) 5.

<sup>7</sup> With respect to resettlement, for example, see Tom de Boer and Marjoleine Zieck, ‘The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU’ (2020) *International Journal of Refugee Law*

<sup>8</sup> UNHCR, *Resettlement Handbook* (2011) 3.

<sup>9</sup> UNHCR, *Resettlement Handbook* (2011) 3.

<sup>10</sup> UNHCR, *The Three-Year (2019-2021) Strategy on Resettlement and Complementary Pathways*, (2019)

<sup>11</sup> de Boer and Zieck, ‘The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU’ 74

<sup>12</sup> European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council’, 2016/0225 (COD), COM(2016) 468 final.

standards under the EU Charter, there would seem to be little appetite for binding standards on resettlement in the EU, or elsewhere.

The suite of measures comprising complementary pathways to admission are further policy instruments not bound by regional or international legal standards. The GCR identifies complementary pathways as comprising family reunification, private refugee sponsorship, humanitarian visas and labour and educational opportunities for refugees.<sup>13</sup> Such approaches are currently discretionary policies undertaken through administrative or legal instruments at national level.

This paper thus proceeds in five sections:

- First, relevant international and regional standards around *access to asylum* are discussed, with a focus on the right to seek asylum, the cornerstone principle of *non-refoulement*, the right to leave and non-penalisation (section 2);
- Second, the working paper addresses legal standards relating to *asylum procedures*, drawing primarily on regional standards set down by the European Convention on Human Rights (ECHR) and the European Union (EU)'s Common European Asylum System (CEAS), the American Convention on Human Rights (ACHR) and the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (section 3);
- Third, the working paper catalogues standards relating to the *scope of international protection* in both international and regional regimes (section 4);
- Fourth, the *content of international protection* is discussed, drawing primarily on Articles 2-34 of the Refugee Convention, as well as relevant standards contained in international and regional human rights instruments (section 5); and
- Finally, the paper provides some preliminary *conclusions* to inform future work of the ASILE project (section 6).

## 1.2 Aims

- to identify relevant legal standards within international and regional systems applicable to asylum governance and mobility/containment policy in light of the GCR
- to analyse the scope of key legal standards at the international and regional level, with specific reference to Bangladesh, Brazil, Canada, Jordan, South Africa and Turkey
- to discuss these standards thematically, reflecting regional understandings and highlighting key issues of relevance to these six countries.

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<sup>13</sup> The GCR identifies complementary pathways as comprising family reunification, private refugee sponsorship, humanitarian visas and labour and educational opportunities for refugees. Global Compact on Refugees, paras 7 and 95.



### 1.3 Overview of International and Regional Legal Standards Binding on the Six States Studied

The GCR asserts that its provisions are grounded in ‘the international refugee protection regime, centred on the cardinal principle of non-refoulement, and at the core of which is the 1951 Convention and its 1967 Protocol’. The Compact further notes its grounding in regional refugee standards, given that ‘[s]ome regions have also adopted specific instruments which apply to their own respective contexts’ with direct reference to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; the 1984 Cartagena Declaration on Refugees; and the Charter of Fundamental Rights of the European Union.<sup>14</sup>

Drawing on the ASILE Country Notes, the following section provides a brief overview of those international and regional standards binding on the six countries central to the ASILE project, Bangladesh, Brazil, Canada, Jordan, South Africa and Turkey.

**Bangladesh** is not party to the Refugee Convention nor its 1967 Protocol but is party to the two international covenants on human rights, the International Covenant on Civil and Political Rights (ICCPR)<sup>15</sup> and the International Covenant on Economic, Social and Cultural rights (ICESCR).<sup>16</sup> However, Bangladesh has ratified neither the ICCPR or ICESCR optional protocols allowing for individual complaints to the Human Rights Committee and UN Committee on Economic, Social and Cultural Rights, respectively.

Bangladesh is party to several other core international human rights instruments, including the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT),<sup>17</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), including its optional protocol, and the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) The country is also party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and of the Convention on the Rights of the Child (CRC),<sup>18</sup> as well as the two optional protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and

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<sup>14</sup> Global Compact on Refugees, para 5.

<sup>15</sup> International Covenant on Civil and Political Rights, adopted 16 December 1966, entry into force 23 March 1976, 999 UNTS 171 (ICCPR).

<sup>16</sup> International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entry into force 3 January 1976, 993 UNTS 3 (ICESCR).

<sup>17</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entry into force 26 June 1987, 1465 UNTS 85 (CAT).

<sup>18</sup> Convention on the Rights of the Child, adopted 20 November 1989, entry into force 2 September 1990, 1577 UNTS 3 (CRC).

pornography. There are no regional human rights treaties in the Asia-Pacific protecting the rights of asylum seekers and refugees.<sup>19</sup>

**Brazil** is party to the 1951 Convention relating to the Status of Refugees and its 1967 protocol, as well as the 1954 Convention relating to the Status of Stateless Persons and the 1967 Convention on the Reduction of Statelessness. Brazil is further a party to the two International Covenants on UN human rights, the ICCPR and the ICESCR. Brazil has ratified the ICCPR's first optional protocol establishing a communication procedure, and the second optional protocol on the abolition of the death penalty. Brazil, however, is not party to the ICESCR optional protocol, which allows for individual complaints to the UN Committee on Economic, Social and Cultural Rights.

Brazil is also party to several other core UN Human Rights instruments, including CAT and its Optional Protocol establishing a monitoring system to prevent violations of the Convention by state parties, the CERD and CEDAW. Brazil is also party to the CRC and its three optional protocols on the involvement of children in armed conflict, on the sale of children, child prostitution and pornography, and on a communication procedure. Brazil, however, has neither signed nor ratified CMW.

As a member state of the Organisation of American States (OAS), Brazil is party of the inter-American human rights system. Brazil is under an obligation to respect human rights as provided in the OAS Charter as well as in the American Declaration of the Rights and Duties of Man. Accordingly, Brazil recognises the functions of the inter-American Commission on human rights, including its competence to formulate recommendations to member states and receive and process individual petitions. Brazil ratified the American Convention on Human Rights in 1992 and since 1998 it has recognized the jurisdiction of the inter-American Court of Human Rights. This implies that the inter-American Commission can refer to the Court cases regarding Brazil.

The 1984 Cartagena Declaration expanded the Geneva-based definition of refugee to include 'persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order'. The Cartagena Declaration also upholds the principle of non-refoulement, including the prohibition of rejection at the border, and reiterates the voluntary and individual character of repatriations of refugees, which should always take place under conditions of safety. Under national Refugee Law 9.474 of 1997, Brazil partially

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<sup>19</sup> Roberto Cortinovis & Lorenzo Rorro, Country Note BANGLADESH (ASILE Country Note, April 2021) available at [https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note\\_Bangladesh.pdf](https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note_Bangladesh.pdf) accessed 16 August 2021. See further Borhan Uddin Khan and Muhammad Mahbubur, Bangladesh - Country Fiche (October 2020) available at [https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche\\_Bangladesh\\_Final\\_Pub.pdf](https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_Bangladesh_Final_Pub.pdf) accessed 16 August 2021.

adopted the broad definition of refugee of the Cartagena Declaration, by extending refugee status to people fleeing situations of ‘severe and generalized violation of human rights’.<sup>20</sup>

**Canada** acceded to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (hereinafter jointly referred to as the 1951 Convention) in 1969. It maintains reservations to articles 23 and 24 of the 1951 Convention by interpreting “lawfully staying” as referring only to refugees admitted for permanent residence.

Canada is party to several core International human rights instruments, including the ICCPR and its two optional protocols, and ICESCR. Canada is also party to the CAT and to the CERD. Canada has not ratified the CAT Optional Protocol establishing a monitoring system to prevent violations of the Convention by state parties and the ICESCR Optional Protocol on a complaints procedure. Canada is not party to the CMW and the 1954 Convention relating to the Status of Stateless Persons.

As a member of the Organisation of American States (OAS), Canada is also party of the inter-American human rights system. Canada is under an obligation to respect human rights as provided in the OAS Charter as well as in the American Declaration of the Rights and Duties of Man. Canada recognises the functions of the inter-American Commission on human rights, including its competence to formulate recommendations to member states and receive and process individual petitions. However, Canada has not ratified the American Convention on Human Rights and has thus not recognized the jurisdiction of the inter-American Court of Human Rights. This also implies that the inter-American Commission cannot refer to the Court cases regarding Canada.<sup>21</sup>

**Jordan** is not party to the Refugee Convention nor its 1967 Protocol, but is party to the ICCPR) and ICESCR. However, Jordan has ratified neither the ICCPR first optional protocol establishing a communication procedure nor the ICCPR second optional protocol on the abolition of the death penalty. Jordan is also not party to the ICESCR optional protocol allowing for individual communications.

Jordan is party to several other core UN human rights instruments, including the CAT and the CERD. Jordan also ratified CEDAW, but not its optional protocol on a communications procedure.

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<sup>20</sup> Roberto Cortinovis & Lorenzo Rorro, Country Note BRAZIL (ASILE Country Note, April 2021) available at [https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note\\_Brazil.pdf](https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note_Brazil.pdf) accessed 16 August 2021. See further Natália Medina Araújo, Brazil - Country Fiche (January 2021) available at [https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche\\_BRAZIL\\_Final\\_Pub.pdf](https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_BRAZIL_Final_Pub.pdf) accessed 16 August 2021.

<sup>21</sup> Roberto Cortinovis, Country Note CANADA (ASILE Country Note, April 2021) available at [https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note\\_Canada.pdf](https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note_Canada.pdf) accessed 16 August 2021. See further Audrey Macklin and Joshua Blum, Canada - Country Fiche (January 2021) available at [https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche\\_CANADA\\_Final\\_Pub.pdf](https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_CANADA_Final_Pub.pdf) accessed 16 August 2021.

Jordan is further party to the CRC and its two optional protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and pornography, but not the third optional protocol on a communication procedure. Jordan is not party to the CMW, nor the 1954 Convention relating to the Status of Stateless Persons or the 1961 Convention on the Reduction of Statelessness.

At the regional level, Jordan is a member of the League of Arab States and a party to the Arab Charter on Human Rights, however the Charter lacks enforcement mechanisms and no regional court has yet been instituted.<sup>22</sup>

**South Africa** has ratified both the 1951 Refugee Convention and its 1967 Protocol. South Africa is party to the ICCPR and ICESCR and has ratified the first ICCPR Optional Protocol on individual communications and the second Second Optional Protocol abolishing the death penalty. In contrast, South Africa has yet to accept the Optional Protocol to the ICESCR allowing for individual complaints.

South Africa is further party to several key UN human rights instruments, including the CAT, CEDAW, the CERD, the CRC, and the Convention on the Rights of Persons with Disabilities (CRPD). South Africa has accepted the competence of the committees of the CEDAW and CRPD to receive individual complaints through the ratification of the corresponding Optional Protocols. Moreover, South Africa acceded to the Optional Protocol to the CAT (OPCAT) in 2019, thereby accepting the competence of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. South Africa has not ratified the Optional Protocol to the CRC to recognise the competence of the Committee on the Rights of the Child in receiving individual complaints.

South Africa is not party to the 1954 Convention relating to the Status of Stateless Persons nor the 1961 Convention on the Reduction of Statelessness. Moreover, South Africa is not party to the CMW or the International Convention for the Protection of all Persons from Enforced Disappearance.<sup>23</sup>

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<sup>22</sup> Roberto Cortinovis & Lorenzo Rorro, Country Note JORDAN (ASILE Country Note, April 2021) available at [https://www.asileproject.eu/wp-content/uploads/2021/05/Country\\_Note\\_Jordan.pdf](https://www.asileproject.eu/wp-content/uploads/2021/05/Country_Note_Jordan.pdf) accessed 16 August 2021. See further Gerasimos Tsourapas and Simon Verduijn, Jordan - Country Fiche (October 2020) available at [https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiches\\_Jordan\\_Pub.pdf](https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiches_Jordan_Pub.pdf) accessed 16 August 2021.

<sup>23</sup> Chun Luk, Country Note SOUTH AFRICA (ASILE Country Note, April 2021) available at [https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note\\_South\\_Africa.pdf](https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note_South_Africa.pdf) accessed 16 August 2021. See further Fatima Khan and Nandi Rayner, South Africa - Country Fiche (October 2020) available at [https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche\\_South-Africa\\_Final\\_Pub.pdf](https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_South-Africa_Final_Pub.pdf) accessed 16 August 2021.

**Turkey** is party to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. Turkey, however, through a declaration made under Article 1(B) of the 1951 Convention and the declaration made upon accession to its 1967 Protocol, limits Turkey's obligations to provide Convention status to refugees from Europe. Turkey is further party to the ICCPR and its two Optional Protocols, and the ICESCR, but not its additional protocol establishing an individual communication procedure. Turkey is also party to several core UN human rights instruments, including the CAT and its Optional Protocol, the CRC and CEDAW. Turkey is party to the CMW and the CERD.

At the regional level, Turkey is a member of the Council of Europe and party to the European Convention on Human Rights and to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Turkey has not ratified Protocol No. 4 to the European Convention of Human Rights, which prohibits collective expulsions of aliens.<sup>24</sup>

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<sup>24</sup> Roberto Cortinovis, Country Note TURKEY (ASILE Country Note, April 2021) available at [https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note\\_Turkey.pdf](https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note_Turkey.pdf) accessed 16 August 2021. See further Meltem Ineli-Ciger and Ozgenur Yigit, Turkey - Country Fiche (October 2020) available at [https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche\\_Turkey\\_Final\\_Pub.pdf](https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_Turkey_Final_Pub.pdf) accessed 16 August 2021.

## 2 ACCESS TO ASYLUM

### 2.1 The Right to Seek Asylum and *Non-refoulement*

#### 2.1.1 International Refugee Law Standards

While Article 14 of the *Universal Declaration on Human Rights* sets out an individual right to seek asylum from persecution,<sup>25</sup> the 1951 Convention is silent on a right to seek asylum. Instead, the Convention lays down in Article 33(1) the principle of *non-refoulement*, which prohibits the forced return of a refugee in the following terms:

No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Article 33(1) has long been considered the 'cornerstone' of international refugee law and is an obligation not open to derogation.<sup>26</sup> Brazil, Canada, South Africa and Turkey are all party to the 1951 Convention, although Turkey maintains a geographical restriction.<sup>27</sup> Bangladesh and Jordan are not party to the Convention.

There is consensus among international refugee law scholars that a customary international law rule of *non-refoulement* reflecting Article 33(1) of the 1951 Convention has emerged, thus binding non-state parties to respect the principle.<sup>28</sup> A customary norm drawn is further supported by robust – though not universal – state practice and *opinio juris*.<sup>29</sup> While instances of *refoulement* undoubtedly still occur, states do not reject the rule outright, rather seeking to expel individuals

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<sup>25</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)).

<sup>26</sup> Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th ed., OUP 2021) 241-349.

<sup>27</sup> As a result, Turkey is only bound to grant Convention status to refugees coming from Europe.

<sup>28</sup> Among those supporting customary status are Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee protection in international law: UNHCR's global consultations on international protection* (Refugee protection in international law: UNHCR's global consultations on international protection, CUP 2003); Goodwin-Gill and McAdam, *The Refugee in International Law* (4th ed., OUP 2021) 300-06; Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para 1 1951 Convention' in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) 1345; Anja Klug and Tim Howe, 'The Concept Of State Jurisdiction And The Applicability Of The Non-Refoulement Principle To Extraterritorial Interception Measures' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control* (Extraterritorial Immigration Control, Brill 2010) 70; and Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?, T.M.C. Asser Press 2016). For a contrary opinion see James C. Hathaway, 'Leveraging Asylum' (2010) 45 *Texas International Law Journal* 503.

<sup>29</sup> Costello and Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test'.

by arguing that they do not qualify for refugee status and thus do not benefit from protection from *refoulement*.<sup>30</sup>

The personal scope of the *non-refoulement* obligation is limited by the 1951 Convention in two key ways. Firstly, the principle only protects individuals who meet the definition of being a refugee under Article 1A(2) of the Convention. Therefore, individuals without a well-founded fear of persecution on a Convention ground fall outside the scope of Article 33(1). However, there is no requirement that the individual have prior recognition as a refugee by the asylum state.<sup>31</sup> Secondly, Article 33(2) excludes a refugee from the benefit of the *non-refoulement* obligation where there are reasonable grounds that they pose a security threat or a danger to the community of the asylum state.

The material scope of the principle is expressly broad. The inclusion of the term 'in any manner whatsoever' within Article 33(1) demonstrates the wide array of return practices covered by the obligation. Clearly, *non-refoulement* encompasses both formal expulsion or deportation proceedings by way of judicial or administrative measures, as well as summary rejection at the border of the asylum state.<sup>32</sup> However, the geographical scope of the principle of *non-refoulement* remains contested. Unlike other human rights treaties, the Refugee Convention has no universal jurisdiction clause and, in the absence of a dedicated international treaty body, interpretation of the territorial scope of the *non-refoulement* obligation has fallen to regional and national courts.

In the 1993 case of *Sale v Haitian Centers Council*, which concerned the interdiction and return of Haitians by United States agents, the United States Supreme Court interpreted Article 33(1) narrowly, finding that the non-refoulement obligation applied only after a refugee had entered state territory.<sup>33</sup> Justice Blackmun dissented, arguing for the extraterritorial application of the Convention principle on the basis that the ordinary meaning of 'refouler' is to expel, repulse, drive back or repel, meanings that do not invite territorial limitation. On appeal to the Inter-American Commission on Human Rights, the Commission accepted UNHCR's interpretation of Article 33(1) of the Refugee Convention as having 'no geographical limitations'.<sup>34</sup>

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<sup>30</sup> Ibid 301; and UNHCR, *San Remo Declaration on the Principle of Non-Refoulement* (6 September 2001).

<sup>31</sup> According to UNHCR: 'Every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established.' UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* para 28.

<sup>32</sup> Among others, see Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' 113.

<sup>33</sup> *Sale v Haitian Centers Council* para 64.

<sup>34</sup> *The Haitian Centre for Human Rights et al. v United States*, Case 10.675, Report No. 51/96, OEA/Ser.L/V/II.98, doc. 6 rev. (1997), para 156.



In 2004, the United Kingdom House of Lords considered the scope of application of the Refugee Convention in *Regina v Immigration Officer at Prague Airport (Roma Rights Case)*, which challenged the United Kingdom's policy of pre-clearance checks of Roma passengers at Prague airport.<sup>35</sup> The applicants argued that, in part, the policy was in breach of the *non-refoulement* obligation under Article 33(1) and, secondly, that the policy in its targeting of Roma Czech nationals was in breach of the non-discrimination clause of Article 3 of the European Convention on Human Rights (ECHR) and customary international law.<sup>36</sup>

The House of Lords held that the United Kingdom's obligations under the Refugee Convention were not enlivened as Article 1A(2) is expressly addressed at individuals outside their country of origin. As the applicants had not met the alienage requirement, they were not protected by Article 33(1). The House of Lords found that applicants:

had at no stage been outside the country of their nationality nor within this country and the procedures adopted by the British authorities at Prague airport did not involve expelling or returning them to the frontiers of the Czech Republic, a state they had never left.<sup>37</sup>

The House of Lords also acknowledged that the *non-refoulement* obligation applies at the border of the asylum state and is not strictly limited to national territory.<sup>38</sup>

Finally, as discussed at length below, the obligation of *non-refoulement* gives rise to a procedural obligation on the part of the asylum state to provide a fair and effective procedure assessing the veracity of an asylum seeker's claim. In order to comply with this obligation, states are obliged to conduct an individual, fair and efficient procedure to determine the protection needs of an asylum seeker.<sup>39</sup>

This procedural obligation does not amount to a right of admission to the asylum state but does require that the state conducts an assessment of the claims of the asylum seeker.<sup>40</sup> Hathaway suggests that Article 33(1) 'amounts to a *de facto* duty to admit the refugee, since admission is normally the only means of avoiding the alternative, impermissible consequence of exposure to

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<sup>35</sup> *Regina v Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*. For a comparison of the *Sale* and *Roma Rights* cases, see den Heijer, *Europe and Extraterritorial Asylum* 125-32.

<sup>36</sup> Refugee Convention art 3 provides: 'The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin'.

<sup>37</sup> *Regina v Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* para 18 per Lord Bingham.

<sup>38</sup> *Ibid* para 26.

<sup>39</sup> Jens Vedsted-Hansen, 'The Asylum Procedures and the Assessment of Asylum Requests' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014).

<sup>40</sup> Daniel Ghezelbash and Nikolas Feith Tan, 'The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection' (2020)



risk’.<sup>41</sup> Some scholars have argued that while it is ‘theoretically possible to provide such procedures extraterritorially, this is difficult, if not impossible’.<sup>42</sup>

At the level of soft law, UNHCR’s 2007 advisory opinion on the extraterritorial application of the *non-refoulement* principle concludes that:

the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be at risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.<sup>43</sup>

UNHCR adopts the complementary approach equating the test for jurisdiction under the Refugee Convention with the international human rights law standard, contending: ‘the decisive criterion is not whether such persons are on the State’s territory, but rather, whether they come within the effective control and authority of that State’.<sup>44</sup> Leading international refugee law scholars support this reading.<sup>45</sup>

In sum, the principle of *non-refoulement* as contained in the Refugee Convention and reflected in customary international law is a cardinal rule of asylum governance, encompassing an obligation to refrain from returning refugees to territories where they face a risk of persecution. The obligation applies to situations within a state’s territory, at the border,<sup>46</sup> and may extend to situations of extraterritorial jurisdiction, for example on the high seas.<sup>47</sup> The principle of *non-refoulement* does not amount to a right of admission but imports a procedural obligation on the part of the asylum state to provide a fair and effective procedure.

## 2.1.2 International Human Rights Law Standards

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<sup>41</sup> James C Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 339.

<sup>42</sup> Asher Lazarus Hirsch and Nathan Bell, ‘The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime’ (2017) 18 *Human Rights Review* 417, 428.

<sup>43</sup> UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* para 24.

<sup>44</sup> Ibid para 43. Lauterpacht and Bethlehem similarly argue for the ‘general proposition that persons will come within the jurisdiction of a State in circumstances in which they can be said to be under the effective control of that State or are affected by those acting on behalf of the State more generally, wherever this occurs. It follows that the principle of non-refoulement will apply to the conduct of State officials or those acting on behalf of the State wherever this occurs, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc.’ Lauterpacht and Bethlehem, ‘The scope and content of the principle of non-refoulement: Opinion’ 111.

<sup>45</sup> Goodwin-Gill and McAdam, *The Refugee in International Law* (4th ed., OUP 2021) 308-18; and Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 379 and 384.

<sup>46</sup> Goodwin-Gill and McAdam, *The Refugee in International Law* (4th ed., OUP 2021) 245-8.

<sup>47</sup> *Hirsi Jamaa and Others v. Italy* Application no 27765/09 (European Court of Human Rights)

The principle of *non-refoulement* is further embedded in international human rights law instruments, proscribing the return of any person to a real risk of torture, inhuman degrading treatment or punishment. In general, international human rights law standards expand the scope of *non-refoulement* by removing the security threat exclusion under Article 33(2) of the Refugee Convention and the requirement that the individual be a refugee. Article 3(1) of the Convention Against Torture (CAT) prohibits *refoulement* in the following terms:

No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.<sup>48</sup>

Article 3 extends protection from *refoulement* to *any person* under the jurisdiction of a state party to CAT. This protection delinks *non-refoulement* from the nexus for persecution under the Refugee Convention, thus protecting all persons from being returned to a country where there is a real risk of torture, including those who pose a security threat to the asylum state.

The 2002 case of *Suresh v Canada* demonstrates the difference in scope between Article 33(1) Refugee Convention and Article 3 CAT.<sup>49</sup> Mr Suresh was a Sri Lankan national deemed to be a security threat to Canada on account of his support for the Liberation Tigers of Tamil Eelam (LTTE). Accordingly, the Canadian Supreme Court held that he could be deported to Sri Lanka, notwithstanding the risk of torture upon return, on the basis of Article 33(2) Refugee Convention. The Committee Against Torture subsequently expressed its concern at: ‘the failure of the Supreme Court of Canada... to recognise, at the level of domestic law, the absolute nature of the protection of Article 3 of the Convention that is subject to no exceptions whatsoever’.<sup>50</sup>

In 1994, the Committee Against Torture held that deportation would violate Article 3 for the first time in *Mutombo v Switzerland*, a communication involving a political dissident from former Zaire. The Committee found that return by the Swiss authorities ‘would have the foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured’ in breach of Article 3.<sup>51</sup> Today, the Committee Against Torture regularly finds that the deportation of asylum

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<sup>48</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Opened for signature 10 December 1984, 1486 UNTS 85 (entered into force 26 June 1987). Bangladesh, Brazil, Canada, Jordan, South Africa and Turkey are all party to the ICCPR.

<sup>49</sup> Ibid. In the Australian context, see the analogous case of *PRHR and Minister for Immigration and Border Protection (Migration)* [2018] AATA 2782.

<sup>50</sup> Committee Against Torture, *Conclusions and recommendations of the Committee against Torture: Canada* (7 July 2005) para 4(a).

<sup>51</sup> *Mutombo v Switzerland* Communication no 13/1993 (Committee Against Torture, 27 April 1994) para 9.5.

seekers and other migrants would violate Article 3 where there is a real risk of torture upon return.<sup>52</sup>

Protection under CAT prohibits return to torture as defined in Article 1,<sup>53</sup> but does not extend to inhuman or degrading treatment or punishment under Article 16.<sup>54</sup> In *Sonko v Spain*, for example, the Spanish Guardia Civil intercepted the complainant trying to swim to the city enclave of Ceuta, brought him on board their vessel and returned him to Moroccan territorial waters. There the Spanish officers threw Mr Sonko into the sea. The complainant drowned and died despite efforts to revive him.<sup>55</sup> The Committee held that the actions of Spanish officials in subjecting Mr Sonko to 'physical and mental suffering prior to his death' met the threshold of Article 16, but did not amount to torture under Article 1, thus not breaching Spain's *non-refoulement* obligations under CAT.<sup>56</sup>

Although the International Covenant on Civil and Political Rights (ICCPR) includes no explicit *non-refoulement* provision, the Human Rights Committee has interpreted Articles 6 and 7 of the Covenant to extend to *non-refoulement*. Article 7 provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.<sup>57</sup>

In its General Comment 20 of 1992, the Human Rights Committee first addressed the question of *non-refoulement*, providing that 'States parties must not expose individuals to the danger of torture, cruel, inhuman or degrading treatment or punishment upon return to another country by

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<sup>52</sup> Fanny De Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture* (Brill 2016) 43.

<sup>53</sup> Article 1 provides: 'For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

<sup>54</sup> Article 16(1) provides: 'Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.

<sup>55</sup> *Fatou Sonko v Spain* Communication No 368/2008 (Committee Against Torture, 25 November 2011) para 2.1.

<sup>56</sup> *Ibid* para 10.4. See further Fernando M. Mariño Menéndez, 'Recent Jurisprudence of the United Nations Committee against Torture and the International Protection of Refugees' (2015) 34 Refugee Survey Quarterly 61, 69.

<sup>57</sup> Article 7 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). Bangladesh, Brazil, Canada, Jordan, South Africa and Turkey are all party to the ICCPR.

way of their extradition, expulsion or refoulement'.<sup>58</sup> The following year, the Committee heard *Kindler v Canada*, a communication that involved the extradition of a United States citizen to death row.<sup>59</sup> Though the Committee did not find that deportation in the specific case would violate Article 6 or 7, it did state that where 'a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.'<sup>60</sup>

In its 2004 General Comment 31, the Committee set out the standard of 'real risk' for assessing possible *refoulement* under Articles 6 and 7, as well as extending the protection to include indirect *refoulement*. Thus, state parties to the ICCPR have an obligation:

not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.<sup>61</sup>

The Human Rights Committee regularly hears communications under Articles 6 and 7 involving the removal of asylum seekers to countries of origin or transit, where authors claim a real risk of irreparable harm if returned.<sup>62</sup> Article 7 ICCPR is a wider protection than Article 3 CAT, which only protects against *refoulement* to torture.

### 2.1.3 Regional Standards

At the regional level, instruments in Europe, the Americas and Africa lay down binding standards on the right to seek asylum and *non-refoulement*, in some cases going beyond the international refugee and human rights law standards discussed above. The following provides a brief overview

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<sup>58</sup> Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (10 March 1992) para 9.

<sup>59</sup> *Kindler v Canada* Communication no 470/1991 (HRC, 30 July 1993).

<sup>60</sup> *Kindler v Canada* para 6.2

<sup>61</sup> Rights Committee, General Comment 31 para 12. On indirect *refoulement* under the Refugee Convention, see UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (26 January 2007) 3: 'where States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion'.

<sup>62</sup> Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' (2020) 21 German Law Journal 355.

of relevant standards from these three regions, in the absence of binding regional standards in Asia and the Middle East.

Within Europe, the ECHR and the EU Charter of Fundamental Rights (EUCFR) set out standards with respect to *non-refoulement* but do not contain an individual right to asylum.<sup>63</sup> The ECHR, to which Turkey is a party, has been interpreted by the European Court of Human Rights (ECtHR) as including an implied prohibition against *refoulement* in Article 3, which provides:

No-one shall be subjected to torture or to inhuman and degrading treatment or punishment.<sup>64</sup>

A long line of judgments since *Soering v United Kingdom* have solidified the principle of *non-refoulement* in the case-law of the ECtHR, as an exception to the sovereign right of states to control the entry, residence and expulsion of non-citizens.<sup>65</sup>

Article 3 ECHR protects against any form of removal as ‘the question whether there is a real risk of treatment contrary to Article 3 in another state cannot depend on the legal basis for removal to that State’.<sup>66</sup> Article 3 ECHR is an absolute provision from which no derogation is possible in wartime or other national emergencies and may override existing international agreements in relation to, for example, extradition or migration control.<sup>67</sup> In the 2011 case of *Hirsi*, notably, the ECtHR interpreted Article 3 ECHR to extend extraterritorially onto the high seas.<sup>68</sup>

At the level of EU law, Article 18 EUCFR establishes a right to asylum ‘with due respect for’ the Refugee Convention and its 1967 Protocol. Article 19 EUCFR further codifies the principle of *non-refoulement* in the following terms:

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<sup>63</sup> Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02. See, for example, *Ilias and Ahmed v Hungary*, Application no. 47287/15, 21 November 2019, para 125.

<sup>64</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

<sup>65</sup> *Soering v The United Kingdom* App no 14038/88 (ECtHR, 7 July 1989); *Vilvarajah and Others v the United Kingdom* 45/1990/236/302-306 (ECtHR, 26 September 1991) para 102; and *Saadi v United Kingdom* App no 13229/03 (ECtHR, 29 January 2008).

<sup>66</sup> *Babar Ahmed and Others v the United Kingdom* App nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09 (ECtHR, 10 April 2012) para 168; As the Court pointed out in *Hirsi*: ‘expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.’ para 114.

<sup>67</sup> *Hirsi Jamaa and Others v Italy* para 129; *Al-Saadoon and Mufdhi v United Kingdom* App no 61498/08 (ECtHR, 2 March 2010) para 128; and De Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture* 21.

<sup>68</sup> *Hirsi Jamaa and Others v Italy* para 22.

No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.<sup>69</sup>

Further substantive standards with respect to the asylum procedures are set out in the Qualification Directive, discussed in depth below. In sum, European regional standards in this area include an absolute prohibition against *non-refoulement* in broader terms than the Refugee Convention, but do not contain an individual right to seek asylum.

In the Americas, the 1969 American Convention on Human Rights (ACHR), to which Brazil (though not Canada) is a party, includes an express right to seek asylum in its Article 22(7):

Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.<sup>70</sup>

In its jurisprudence, the Inter-American Committee for Human Rights (IACmHR) has confirmed this right is limited to seeking asylum in accordance with both domestic and international law.<sup>71</sup> The Inter-American Court for Human Rights (IACtHR) has further broadened the apparent limitation with respect to 'political offenses', interpreting Article 22(7) to reflect the inclusion criteria set out in Article 1A(2) of the Refugee Convention.<sup>72</sup> At the level of soft law, the Article XXVII of the 1948 American Declaration of the Rights and Duties of Man (ADHR) includes the right to seek and enjoy asylum.<sup>73</sup>

The ACHR further includes the obligation of *non-refoulement* in Article 22(8):

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

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<sup>69</sup> Cf. European Union Agency for Fundamental Rights and ECtHR/Council of Europe, *Handbook on European law relating to asylum, borders and immigration* (Edition 2020) 25-6.

<sup>70</sup> Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969. See further Roberto Cortinovis & Lorenzo Rorro, Country Note BRAZIL (ASILE Country Note, April 2021) available at [https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note\\_Brazil.pdf](https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note_Brazil.pdf) accessed 16 August 2021; and Roberto Cortinovis, Country Note CANADA (ASILE Country Note, April 2021) available at [https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note\\_Canada.pdf](https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note_Canada.pdf) accessed 16 August 2021.

<sup>71</sup> *The Haitian Centre for Human Rights et al. v United States* para 151.

<sup>72</sup> *Case of the Pacheco Tineo Family v Plurinational State of Bolivia*, Inter-American Court of Human Rights (IACtHR), 25 November 2013 para 142.

<sup>73</sup> American Declaration of the Rights and Duties of Man, 2 May 1948, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.

Article 22(8) broadly reflects Article 33(1) of the Refugee Convention, though makes explicit that the obligation extends to third countries beyond the individual's country of origin.

In sum, regional standards in the Americas include an express, individual right to seek asylum in accordance with the domestic law of the asylum state and international law standards. The ACHR further provides for the obligation of *non-refoulement*, essentially in the same terms as Article 33(1) of the Refugee Convention.

In Africa, the 1981 African Charter on Human and Peoples' Rights (ACHPR), to which South Africa is a party, includes in Article 12(3) a right to 'seek and obtain asylum in other countries in accordance with laws of those countries and international conventions'.<sup>74</sup> The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems, to which South Africa is a party, further contains a broad conception of the *non-refoulement* obligation in its Article II(3):

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.<sup>75</sup>

The principle of *non-refoulement* in the OAU Convention has often been interpreted as broader than international refugee law on three grounds. First, the bar against returning a person to a risk against her/his 'physical integrity' would seem to go beyond the formulation of 'life or freedom' contained in Article 33(1) of the Refugee Convention.<sup>76</sup> Second, the OAU Convention expressly includes rejection at the frontier as within the geographical scope of Article II(3), thus going beyond the formal terms of international refugee law.<sup>77</sup> Third, while Article II(3) contains no national security exception, Articles I(4)(f) and (g) provide that the Convention ceases to apply where a refugee has committed a serious non-political crime or seriously infringed the purposes and objectives of this Convention after admission. As a result, the principle of *non-refoulement* is only slightly expanded upon in African refugee law vis-à-vis international refugee law.<sup>78</sup>

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<sup>74</sup> Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter) 27 June 1981 CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) art 12(3). The African Charter had been ratified by 53 of the 54 member states of the African Union. See further Chun Luk, Country Note SOUTH AFRICA (ASILE Country Note, April 2021) available at [https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note\\_South\\_Africa.pdf](https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note_South_Africa.pdf) accessed 16 August 2021.

<sup>75</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 45

<sup>76</sup> Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (OUP 2018) 73.

<sup>77</sup> Ibid 74.

<sup>78</sup> Ibid.



## 2.2 The Right to Leave

### 2.2.1 International Human Rights Law Standards

The right to leave any country, including one's own, is provided for in Article 12(2) ICCPR, building on Article 13(2) of the Universal Declaration of Human Rights. The scope of the right extends to both nationals and non-nationals and has been characterised as fundamental to refugee protection as a necessary condition of accessing international protection is alienage from one's own country.<sup>79</sup> The right to leave does not amount to a right of *entry* into another country.<sup>80</sup> This stand-alone nature of the right arguably renders the right to leave extremely limited in scope, though some scholars have put forward arguments for right to leave to bridge the gap between flight and asylum.<sup>81</sup>

The right to leave is not absolute. Article 12(3) ICCPR allows for necessary limitations provided by law to protect national security, public order, public health and the morals or rights and freedoms of others. These restrictions must be necessary and consistent with the other rights of the Covenant.<sup>82</sup> The Human Rights Committee has stressed that state restrictions may not impinge on the core of the right nor nullify it outright.<sup>83</sup> The right to leave is derogable under Article 4 ICCPR where there is an officially proclaimed public emergency which threatens the life of the nation.

There has thus far been limited jurisprudence from the Human Rights Committee on the right to leave. In *El Ghar v Libya*, the Human Rights Committee found a breach of the right to leave where national authorities failed to issue a passport to a Libyan national residing in Morocco.<sup>84</sup> In *Tarlu v Canada*, concerning the return of a failed asylum seeker's passport, the Committee found that the state's retention of the author's passport fell under a necessary limitation.<sup>85</sup>

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<sup>79</sup> Elspeth Guild, *The right to leave a country* (Council of Europe Commissioner for Human Rights Issue Paper, 2013) 6.

<sup>80</sup> Colin Harvey and Robert P Barnidge Jr, 'Human rights, free movement, and the right to leave in international law' (2007) 19 *International Journal of Refugee Law* 1.

<sup>81</sup> Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 *European Journal of International Law* 591; Violeta Moreno-Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 *European Journal of Migration and Law* 315; Maarten den Heijer, *Europe and extraterritorial asylum* (Bloomsbury Publishing 2012) 156.

<sup>82</sup> Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' 597; and Guild, 'The right to leave a country' 5; Human Rights Committee, *General Comment No. 27: Article 12 (Freedom of Movement)* CCPR/C/21/Rev.1/Add.9 (2 November 1999) para 14.

<sup>83</sup> Human Rights Committee, *General Comment No. 27* para 13 (emphasis added). See further James C Hathaway and Marjoleine Zieck, *Michigan Guidelines on Refugee Freedom of Movement* (2018) 39 *Michigan Journal of International Law* 5-17, paras 4-5 (The Michigan Guidelines on Refugee Freedom of Movement); and Marjoleine Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39 *Michigan Journal of International Law* 19, 25.

<sup>84</sup> *El Ghar v Libyan Arab Jamahiriya* Communication no 1107/2002 (HRC, 29 March 2004).

<sup>85</sup> *Tarlu v Canada* Communication no 1551/2007 (HRC, 28 April 2007) para 7.7.



## 2.2.2 Regional Standards

Article 2(3) ECHR Protocol 4<sup>86</sup> mirrors Article 12(2) ICCPR and is derogable under Article 15 ECHR. While most of ECtHR jurisprudence in this area relates to former Soviet states' restrictions on departure, in *Xhavara v Italy and Albania* the ECtHR addressed the right to leave in the context of migration control. The case concerned the application of Albanian irregular migrants whose boat, the *Kater I Rades*, was rammed by an Italian naval vessel resulting in the death of 83 passengers. The ECtHR found that Italy's conduct was 'designed not to prevent the applicants from leaving Albania but, rather, from entering Italy', thus not breaching Article 2 ECHR Protocol 4.<sup>87</sup>

## 2.3 Non-penalisation

An important element in accessing asylum procedures for refugees is the principle of non-penalisation for illegal entry. Article 31(1) Refugee Convention thus provides:

Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

While Article 31(1) does not clarify whether non-penalisation protects only recognised refugees or also asylum seekers, the declaratory nature of refugee status, subsequent jurisprudence and academic opinion strongly support the proposition that Article 31(1) encompasses both asylum seekers and refugees.<sup>88</sup>

The requirement in Article 31(1) that refugees come 'directly from a territory where their life or freedom was threatened' raises questions about the obligation's applicability to secondary movement. Article 31(1) does not require that a refugee come directly from her/his country of origin as the provision refers to 'a' territory – not 'the' territory – where they face a threat to life

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<sup>86</sup> Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 16 September 1963, entry into force 2 May 1968, ETS No. 46 (ECHR Protocol 4).

<sup>87</sup> *Xhavara and Others v Italy and Albania* App no 39473/98 (ECtHR, 11 January 2011).

<sup>88</sup> For an overview of jurisprudence, see Cathryn Costello, *Article 31 of the 1951 Convention Relating to the Status of Refugees* (UNHCR legal and protection policy research series, 2017) 14-15. See further Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 488-9; Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection' 193; and Gregor Noll, 'Article 31 (Refugees Unlawfully in the Country of Refuge)' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol. A Commentary* (OUP 2011) 1253.

or freedom. Equally, however, a refugee who receives asylum in one state only to move on to another does not benefit from the non-penalisation provision.<sup>89</sup>

Non-penalisation encompasses detention, limitations on freedom of movement and other penalties, such as denial of social support or fines.<sup>90</sup> Any penalties must be ‘necessary’ and limited until the refugee’s status in the country is ‘regularised’. As a result, Article 31(1) provides that detention of asylum seekers and refugees is not unlawful *per se*, but must be prescribed by law, proportionate and in light of the individual circumstances of the detained person.<sup>91</sup>

## 3 ASYLUM PROCEDURES

### 3.1 Impact of the Refugee Convention and UNHCR Guidance

#### 3.1.1 The Refugee Convention

As explained above in section 2.1.1, a state party to the Refugee Convention will not be able to comply with the prohibition of *refoulement* in Article 33(1) of the Convention without examining a claim to refugee status before forcibly returning asylum seekers claiming to be in need of protection to their country of origin. Similarly, the human rights treaties extending the protection against *refoulement*, such as Article 7 of the ICCPR, Article 3 of CAT and Article 3 of the ECHR,<sup>92</sup> require the authorities of any state of arrival, or otherwise exercising jurisdiction, to examine requests for international protection if they consider deporting the asylum seeker.

While the Refugee Convention does not contain specific procedural requirements or standards for the determination of refugee status, the Convention presupposes the existence of such procedures at national level. Article 9 allows states to take, in times of war or other grave and exceptional circumstances, provisional measures which they consider essential to national security in the case of a particular person pending ‘determination’ that that person is in fact a refugee and that the continuance of such measures is necessary in the interests of national security. In the same vein, Article 31(2) permits necessary restrictions on the movements of refugees until their

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<sup>89</sup> Costello, *Article 31 of the 1951 Convention Relating to the Status of Refugees* 17-22.

<sup>90</sup> Ibid 37; and UNHCR, *Summary Conclusions: Article 31 of the 1951 Convention* (June 2003) para 10(h).

<sup>91</sup> Article 26 of the Refugee Convention sets out the right to freedom of movement for refugees *lawfully present* on the territory of a state party. See further Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 860-86; and Marjoleine Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39 *Michigan Journal of International Law* 19, 79-87.

<sup>92</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, entry into force 3 September 1953, ETS No. 5.

status in the country is 'regularized' or they obtain admission into another country. Thus, both Articles allude to a national procedure being in place in order to determine the legal status of persons who claim to be refugees as defined by the Convention.

Despite the absence of procedural standards, the Refugee Convention therefore imposes on states an implicit duty to establish organisational and procedural mechanisms that can meaningfully deal with asylum applications in order to secure compliance with their Convention obligations. Whether such mechanisms should be administrative or judicial or some combination of the two types of procedures is essentially left with states to decide. Inasmuch as decisions on asylum cases will normally affect not only the applicants' status under the Refugee Convention, but also their protection against *refoulement* under human rights treaties, however, the obligation under these treaties to provide *effective remedies* in the national legal system to all persons claiming a violation of their human rights also applies towards asylum seekers. Ultimately, such remedies will therefore have to be of a judicial or quasi-judicial nature, as further elaborated in section 3.2 below.

National asylum law and policy frequently seem to reflect the preunderstanding that asylum seekers have no refugee-specific rights as long as their status or need of international protection has not yet been recognised. However, this is at variance with the basic principle of refugee law that refugee status is *not contingent on formal recognition*, as succinctly explained in the classical UNHCR statement:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.<sup>93</sup>

In line with this statement, legal doctrine generally assumes that recognition of refugee status is not constitutive of such status, but merely a *declaratory* act.<sup>94</sup> As states' protection obligations under the Refugee Convention therefore do not depend on the recognition of refugee status, the procedures to be established for the determination of refugee status must be suitable to effectively identify persons who fall within the definition in Article 1 A-F of the Refugee

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<sup>93</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979, reissued in 1992, 2011 and 2019), para 28.

<sup>94</sup> Cf. James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 178-9, 312; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th ed., OUP 2021) 54, 307-08; Andreas Zimmermann and Claudia Mahler, 'Article 1 A, para. 2', in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) 298-99, 314; James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd ed., CUP 2014) 1, 25-26.

Convention so as to secure that they will be treated in accordance with the standards laid down in Articles 2-34 of the Convention.

### 3.1.2 UNHCR Guidelines

In order to promote the effective implementation of states' obligations under the Convention, the Executive Committee of the UNHCR's Programme recommended more than 40 years ago that national procedures for the determination of refugee status should satisfy certain basic requirements. Despite its non-binding nature, this recommendation has had significant influence on the asylum procedures established in many states parties to the Convention and has further inspired standard-setting at the regional level. The standards recommended by the UNHCR Executive Committee are as follows:

- (i) The competent official (e.g. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might be within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority.
- (ii) The applicant should receive the necessary guidance as to the procedure to be followed.
- (iii) There should be a clearly identified authority – wherever possible a single central authority – with responsibility for examining requests for refugee status and taking a decision in the first instance.
- (iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.
- (v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.
- (vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing stem.
- (vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.<sup>95</sup>

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<sup>95</sup> UNHCR Executive Committee, Conclusion No 8 (XXVIII) 1977: Determination of Refugee Status, section (e).

The Executive Committee further requested the Office of the High Commissioner to consider the possibility of issuing – for the guidance of governments – a handbook relating to procedures and criteria for determining refugee status.<sup>96</sup> This request resulted in the publication by UNHCR two years later of the *Handbook for Determining Refugee Status* that has been subsequently reissued three times.<sup>97</sup> Part two of the *Handbook*, dealing with procedures for determination of refugee status, restates the abovementioned basic requirements recommended by the Executive Committee<sup>98</sup> and sets out principles and methods for establishing the facts in asylum cases and criteria for applying the principle of the benefit of the doubt in deciding such cases.<sup>99</sup>

Since the early 1990s, the Executive Committee's recommendations included certain quality ambitions or organisational ideals for the asylum procedures to be in place, such as 'fair and efficient',<sup>100</sup> 'fair and effective',<sup>101</sup> and 'fair and expeditious'.<sup>102</sup> In addition, the recommendations have increasingly focused on particularly vulnerable categories of asylum seekers, in particular women and children.<sup>103</sup> The scope of the Executive Committee's recommendations has further been expanded so as to not only address procedures for the determination of Convention refugee status, but also articulate the relevance of its recommended standards for the examination of asylum seekers' need for complementary or subsidiary forms of protection.<sup>104</sup>

The UNHCR *Handbook* has been supplemented by the issuance of more *ad hoc* recommendations from the UNHCR Office, as well as a number of thematic *Guidelines on International Protection*, some of which address procedural issues.<sup>105</sup> As a recent example responding to the COVID-19 pandemic, UNHCR adopted a paper setting forth key legal considerations on access to territory for

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<sup>96</sup> Ibid., section (g).

<sup>97</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva 1979, reissued in 1992, 2011 and 2019), para 28.

<sup>98</sup> Ibid., para 192.

<sup>99</sup> Ibid., paras 195-205.

<sup>100</sup> UNHCR Executive Committee Conclusion No. 65 (XLII) (1991) para (o), Conclusion No. 71 (XLIV) (1993) para (i), Conclusion No. 74 (XLV) (1994) para (i) and Conclusion No. 103 (LVI) (2005) para (r).

<sup>101</sup> UNHCR Executive Committee Conclusion No. 81 (XLVIII) (1997) para (h) and Conclusion No. 82 (XLVIII) (1997) para (d).

<sup>102</sup> UNHCR Executive Committee Conclusion No. 93 (LXXX) (2002) para (a).

<sup>103</sup> See, for example, UNHCR Executive Committee Conclusion No. 64 (XLI) (1990) para (a)(iii), Conclusion No. 73 (XLIV) (1993), Conclusion No. 105 (LVII) (2006) and Conclusion No. 107 (LVIII) (2007).

<sup>104</sup> UNHCR Executive Committee Conclusion No. 85 (XLIX) (1998) para (r) and Conclusion No. 103 (LVI) (2005) paras (b) and (g).

<sup>105</sup> UNHCR, *Guidelines on International Protection No. 1 - No. 13*. No. 1 was titled 'Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (HCR/GIP/02/01), 7 May 2002, the most recent No. 13 was 'Applicability of Article 1 D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees' (HCR/GIP/17/13, December 2017) (<https://www.unhcr.org/search?page=search&skip=0&docid=&cid=49aea93ae2&comid=4a27bad46&tags=RSDguidelines>, accessed 7 October 2021).

persons in need of international protection, including considerations on certain procedural guarantees that must be observed while protecting public health.<sup>106</sup>

In addition to the procedural standards adopted and recommended by UNHCR and its Executive Committee, significant standard-setting relating to asylum procedures has taken place at regional level, primarily in the framework of the systems established for the protection of human rights. Thus, within the Council of Europe guidelines largely similar to the abovementioned UNHCR basic requirements were adopted by the Committee of Ministers in 1981.<sup>107</sup> As a supplement to these recommended standards, the ECtHR has established certain standards that must be complied with by national authorities in order to secure effective protection of the rights enshrined in Articles 3 and 13 ECHR when dealing with asylum cases. Similarly, within the Inter-American human rights system and the African human rights system, a number of recommended standards on asylum procedures have been adopted over the years.<sup>108</sup>

### 3.1.3 Modalities for Determining Refugee Status

In line with the Refugee Convention's focus on individuals who meet the criteria in the refugee definition,<sup>109</sup> asylum procedures have traditionally aimed at the determination of the status of each individual applicant. In particular, industrialised states in the Global North have adopted standards and organisational design of the examination procedure focusing on individual asylum seekers. This has resulted in the development of detailed procedural safeguards for asylum seekers and often strict scrutiny of the evidence presented by asylum seekers and of their individual credibility.

It is widely recognised, however, that such individualised determination procedures are not always practically feasible and also not always necessary. In situations where entire groups of persons have been displaced, often on a large scale, under circumstances indicating that the members of the group can be considered individually as refugees, states as well as UNHCR have resorted to '*group determination*' of refugee status in which each member of the group is considered *prima*

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<sup>106</sup> UNHCR, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, 2020, para 4.

<sup>107</sup> Council of Europe, Committee of Ministers, Recommendation No R (81) 16 on the Harmonisation of National Procedures relating to Asylum, 5 November 1981. See also Recommendation No R (98) 13 on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Art. 3 ECHR, 18 September 1998, reflecting subsequent ECtHR caselaw.

<sup>108</sup> On procedural standards in human rights law, see section 3.2 *infra*. For an account of regional standards in Africa, the Americas and Europe, see Álvaro Botero and Jens Vedsted-Hansen, 'Asylum Procedure', in Cathryn Costello, Michelle Foster and Jane McAdam (eds.), *The Oxford Handbook of International Refugee Law* (OUP 2021) 597-606. Significant parts of the following sections are based on this co-authored chapter.

<sup>109</sup> Cf. James C. Hathaway, *The Law of Refugee Status* (Butterworths 1991) 24-27.

*facie* as a refugee.<sup>110</sup> Thus, members of the group in question are presumed to be refugees in the absence of evidence to the contrary relating to individual persons, including possibly the basis for application of the exclusion clauses in Article 1 F of the Refugee Convention.<sup>111</sup>

More recently, the relevance of *prima facie* recognition of refugee status was recognised by the UN Global Compact on Refugees with a particular view to large refugee movements. The GCR considers ‘group-based protection’ as a means of addressing international protection needs where considered appropriate by the affected state.<sup>112</sup> While this is indeed a helpful and constructive approach with a view to enhancing states’ protection capacity, it cannot be ignored that in some circumstances ‘group-based’ models could risk having opposite effects. Most importantly, such an approach to recognising the need for protection of an entire group of displaced persons might result in granting them protection outside of the Refugee Convention framework, thus operating as a kind of trade-off that is perceived by certain states as justifying an inferior legal status with fewer rights or lower protection standards. As a somewhat perverse version of a ‘group-based’ approach, directly opposing the GCR objectives, it might even operate as an exclusionary procedural mechanism leading to practices of *de jure* or *de facto* collective expulsion of asylum seekers (see section 3.2.2 *infra*).

Importantly, *prima facie* recognition may also be an appropriate approach within individualised asylum procedures as the presumption of refugee status can facilitate the assessment of evidence, thereby simplifying or accelerating the examination of individual applications for asylum.<sup>113</sup> Such an approach would in particular provide a useful procedural device in situations where larger numbers of asylum seekers from the same country of origin arrive within a short period of time insofar as the alternative, due to absence of the ‘evidentiary benefit’ that is inherent in the *prima facie* approach, would risk overstressing the traditionally individualised examination systems.<sup>114</sup>

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<sup>110</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, para 44; UNHCR, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status* (HCR/GIP/15/11), June 2015.

<sup>111</sup> Cf. UNHCR, *Guidelines on International Protection No. 11*, paras 18-21.

<sup>112</sup> Global Compact on Refugees (Part II of the Report of the UNHCR, A/73/12), affirmed by UN General Assembly Resolution 73/151, 17 December 2018, para 61.

<sup>113</sup> Cf. UNHCR, *Guidelines on International Protection No. 11*, paras 40-41.

<sup>114</sup> On such a procedural approach under the schemes of collective temporary protection of Bosnian refugees in the Scandinavian (and other European) countries in the 1990s, see Jan-Paul Brekke, Rebecca Stern and Jens Vedsted-Hansen, *Temporary asylum and cessation of refugee status in Scandinavia. Policies, practices and dilemmas*, EMN Norway Occasional Papers, Oslo 2020.



While states parties to the Refugee Convention are under the obligation to establish procedures that are capable of determining which asylum seekers are refugees within the Convention definition and therefore entitled to treatment in accordance with Articles 2-34 of the Convention, the details of the organisational design and operation of asylum procedures are largely left with states. International law allows states to take into account the constitutional and administrative structures prevailing in their domestic system as regards first instance examination as well as appeal procedures.<sup>115</sup> The international standards on asylum procedures described in this section have been merely recommendatory, intended to ensure certain minimum procedural safeguards.

In order to be able to establish the requisite examination procedures, some states have received technical or legal assistance from UNHCR, due to their lack of resources or experience in dealing with asylum applications. Such assistance can have various forms, ranging from assisting state authorities during their establishment of national asylum systems to UNHCR itself carrying out refugee status determination under special agreements with the host state having undertaken to comply with decisions made by UNHCR in terms of granting protection to refugees recognised by UNHCR at least until resettlement places become available. As an intermediate arrangement, UNHCR is in some instances involved in the conduct of national asylum procedures by participating on an ongoing basis in state bodies entrusted with the examination of asylum applications or appeal cases.<sup>116</sup> In 2019, 116 states carried out their own examination procedures while UNHCR conducted refugee status determination in some 53 countries.<sup>117</sup>

In case of operating in states that are not parties to the Refugee Convention, UNHCR carries out refugee status determination on the basis of the mandate laid down in the organisation's Statute.<sup>118</sup> The organisational modalities and procedural standards for such mandate refugee status determination activities have been decided by the UNHCR itself, partially influenced by recommendations from the UNHCR Executive Committee.<sup>119</sup> While UNHCR's status determination procedures also focus on individual persons, UNHCR will often determine eligibility for refugee status on a 'group basis' or at least based on *prima facie* recognition of individual applicants, in

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<sup>115</sup> Cf. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, para 189.

<sup>116</sup> Needless to say, such assistance may raise issues of states' dependency on UNHCR in terms of finances and organisation of the procedures, as well as of UNHCR having to balance state interests and policies not necessarily promoting refugee protection principles.

<sup>117</sup> UNHCR, *Global Trends 2019: Forced Displacement in 2019* 43.

<sup>118</sup> Statute of the Office of the United Nations High Commissioner for Refugees, adopted by UN General Assembly Resolution 428 (V) of 14 December 1950. The personal scope of UNHCR's competence is defined in paras 6 and 7 that largely reflect the refugee definition in Article 1 of the Refugee Convention, while UNHCR's protection mandate is described in paras 8 and 9 of the Statute.

<sup>119</sup> Cf. UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate* (August 2020) ([4317223c9.pdf \(unhcr.org\)](#), accessed 7 October 2021).



particular in situations of large-scale refugee movements or where conditions in the country of origin have essentially similar effects on a large population.<sup>120</sup>

### 3.1.4 Border Procedures, Admissibility, Accelerated Examination

Various specific procedural issues concerning the examination of asylum cases have become gradually settled in connection with the requirement of effective remedies that is linked to the protection against *refoulement* in human rights law (see sections 3.2 and 3.3 *infra*). While this protection and the accessory requirement of effective remedies under human rights treaties directly concern only complementary or subsidiary protection, the relevant standards may have indirect impact on the determination of Convention refugee status as well. This is in particular so in states operating a single asylum procedure in which applications are being examined with a view to eligibility for complementary or subsidiary protection if the asylum seeker is found not to fall within the Refugee Convention definition.<sup>121</sup> This section will briefly account for some of the standards applying to the examination of asylum cases in such a combined single procedure.

First, a crucial distinction has to be made between *admissibility decisions* and the *substantive examination* of applicants' need for international protection. In order to emphasise the legal nature and the potential consequences of erroneous decisions in asylum applications, it is essential to maintain clarity as to whether such an application has been examined on the merits of the need for protection, or the asylum seeker has been subjected to a purely formal decision on inadmissibility, refusing entry and referring his or her case to another state considered as being responsible for the examination.

The possibility of conflating these two distinct issues is particularly acute in systems operating *border procedures*. Border procedures are generally not suitable for the proper examination of protection needs, as reflected in the UNHCR Executive Committee's recommendations on asylum procedures quoted above.<sup>122</sup> In order to prevent violation of the Refugee Convention as well as the protection against *refoulement* under human rights treaties,<sup>123</sup> it is therefore crucial that border procedures are operated with caution and only exceptionally include decisions on substance, if at all.

Second, border procedures may seem particularly problematic in situations as mentioned above where one state returns an asylum seeker to another state assuming that the responsibility for

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<sup>120</sup> *Ibid.*, at 14 and 90.

<sup>121</sup> See, for example, the EU standards laid down in Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ 2013 L180/60 (hereafter EU Asylum Procedures Directive), recital 11 and Articles 3 and 10(2).

<sup>122</sup> UNHCR Executive Committee, Conclusion No. 8 (XXVIII) (1977) para (e)(iii).

<sup>123</sup> On the procedural impact of the principle of *non-refoulement* in human rights law, see section 3.2 *infra*.

examining the application lies with the latter state. In order to prevent the risk of indirect *refoulement* to the asylum seeker's country of origin, and that of 'orbit' situations in which no state accepts responsibility for the examination or for the asylum seeker's person, agreed criteria and practical arrangements for the division of inter-state responsibility for the examination of asylum applications are essential. Notwithstanding the failures of the Dublin system established by the EU and the arguable deficiencies of both design and implementation of this system,<sup>124</sup> this system could in theory be considered an advantage insofar as it specifies that one single member state is to be identified as responsible for examining each application before the asylum seeker can be returned to the country of origin.<sup>125</sup>

A procedural device often providing the basis for inadmissibility decisions is built on the notions of 'safe third country' and 'first country of asylum', which also must be clearly defined and cautiously applied in order to prevent violation of states' obligations under the Refugee Convention and human rights treaties. When applied in border procedures allowing for the return of asylum seekers to another state that is considered responsible for examining the case and taking over protection of the asylum seeker, whether or not already granted asylum there, these notions presuppose an actual connection between the asylum seeker and the third country in question, as well as genuine prospects of readmission into that country. Crucially, the asylum procedures, the reception conditions and the standards of protection for persons granted asylum in the 'safe third country' must be in compliance with the obligations under both the Refugee Convention and human rights treaties, including protection against *refoulement* as well as the various civil, social and economic rights enshrined in these instruments.<sup>126</sup>

Third, for the substantive examination of asylum cases states often establish special procedures in order to deal expeditiously with applications that are considered manifestly unfounded. The relevance of *accelerated procedures* for asylum cases that are so obviously without foundation as not to merit full examination at every level of the procedure has been widely recognised, but with the proviso that they should be applied exclusively to *narrow and objectively defined types of cases*. In a recommendation on the problem of manifestly unfounded or abusive applications for asylum, the UNHCR Executive Committee defined such cases as 'those which are clearly fraudulent

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<sup>124</sup> Cf. UNHCR, *Left in Limbo. UNHCR Study on the Implementation of the Dublin III Regulation* (Geneva 2017).

<sup>125</sup> Cf. Article 3 of EU Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) OJ 2013 L180/31.

<sup>126</sup> Cf. James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 366--75; Rainer Hofmann and Tillmann Löhr, 'Introduction to Chapter V: Requirements for Refugee Determination Procedures', in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) 1110-14. For an account of the Safe Third Country arrangement between the United States and Canada, see Audrey Macklin and Joshua Blum, Canada - Country Fiche (January 2021) available at [https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche\\_CANADA\\_Final\\_Pub.pdf](https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_CANADA_Final_Pub.pdf) accessed 16 August 2021.

or not related to the criteria for the granting of refugee status [under the Refugee Convention] nor to any other criteria justifying the granting of asylum'.<sup>127</sup>

Currently states tend to be extending the scope of application of accelerated asylum procedures. In some instances acceleration of the examination procedure has been based on less objective criteria or *generalised assumptions* of specific countries as being 'safe countries of origin'.<sup>128</sup> In particular when operated in the context of border procedures, this approach to asylum applications may lead to summary examinations with negative consequences for the quality of decisions, enhancing the risk of erroneous rejection of people in need of protection.

## 3.2 Procedural Standards in Human Rights Law

### 3.2.1 Filling the Gap: Evolving Standards on Asylum Procedures

Treaty bodies within the United Nations human rights system as well as the regional systems – including the European, the Inter-American and the African human rights system – have developed standards pertaining to asylum procedures by interpreting and applying their respective human rights treaties in judgments and other protection mechanisms such as country reports, thematic reports and resolutions. These standards have evolved on the basis of general interpretation and application in concrete situations of the rights to an effective national remedy, fair trial and judicial protection in order to determine the procedural safeguards that must be observed in connection with the examination of applications for asylum.<sup>129</sup> In addition, certain procedural obligations have been derived from the substantive provisions prohibiting *refoulement* beyond the scope of the Refugee Convention, thus establishing the treaty basis for subsidiary or complementary protection, in particular the prohibition of torture and cruel, inhuman or degrading treatment.

By way of evolutive interpretation of rights enshrined in the various human rights treaties, these international treaty bodies have developed a minimum set of procedural guarantees that must be respected in the framework of asylum procedures. Hence, the human rights treaty bodies at universal and, in particular, at regional level have contributed to filling the normative gap that results from the fact that the Refugee Convention does not explicitly address the issue of asylum procedures and provides no standards for such procedures. In the light of this development, Vincent Chetail has indicated that 'the substantial overlap between the principle of *non-*

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<sup>127</sup> UNHCR Executive Committee Conclusion No. 30 (XXXIV) (1983) para (d).

<sup>128</sup> See, for example, Articles 31(8), 36 and 37 of the EU Asylum Procedures Directive.

<sup>129</sup> See Álvaro Botero and Jens Vedsted-Hansen 'Asylum Procedure', in Cathryn Costello, Michelle Foster and Jane McAdam (eds.), *The Oxford Handbook of International Refugee Law* (OUP 2021) 597-605.

*refoulement* under refugee law and human rights law has a critical impact by compensating for the absence of procedural guarantees in the Geneva Convention'.<sup>130</sup>

This jurisprudential development within human rights law reflects the understanding that when it comes to protecting asylum seekers and people in need of international protection, it is necessary to establish procedural safeguards in order to secure the effective exercise of the right to seek asylum as well as the effectiveness of the prohibition of *refoulement*. This development has been inspired by some of the standards already adopted in connection with the Refugee Convention, while some of the soft law standards in relation to the Refugee Convention have similarly been inspired by developments within the human rights treaty system (see section 3.1 *supra*).

### 3.2.2 The Right to an Asylum Procedure

Closely connected to the right to seek asylum as a precondition for accessing protection, as discussed in section 2 *supra*, is the question of a right to access a procedure examining the applicant's need for international protection. The existence of a right to an asylum procedure has been confirmed by various human rights treaty bodies, as shall be illustrated in the following with a special focus on the case-law of the European Court of Human Rights. In practice, yet not necessarily in theory and as a matter of principle, such a right will often be identical with the right to enter the territory of a state for the duration and for the sole purpose of the examination procedure.

Perhaps the most explicit clarification of the scope and the modalities of the right to an asylum procedure has been given by the ECtHR on the basis of the requirement of an effective national remedy under Article 13 ECHR in conjunction with the prohibition of *refoulement* in Article 3. Notably, Article 3 ECHR has been interpreted so as to include separate procedural obligations as a corollary to the substantive protection against *refoulement* under this provision, as has been emphasised by the ECtHR in recent judgments concerning lack of access to asylum procedures in certain European states. The requirement to establish an asylum procedure and to secure access to that procedure within the European human rights system will be analysed in this section while the broader human rights standards on the conduct of such procedures will be elucidated in the following sections.

The general principle that asylum seekers have a right of access to an examination procedure was unequivocally recognised by the ECtHR in the judgment concerning 'hot return' of third-country nationals who attempted to enter Spanish territory irregularly by climbing the fences surrounding the Spanish enclave of Melilla on the coast of North Africa. While the Court's assessment of the

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<sup>130</sup> Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed.), *Human Rights and Immigration* (OUP 2014) 53.

concrete issue of collective expulsion under these specific circumstances has been rather heavily disputed,<sup>131</sup> the ECtHR clearly emphasised in general terms the fundamental right to have access to an asylum procedure. This right is based in particular on Article 3 and is further guaranteed by the prohibition of collective expulsion under Article 4 ECHR Protocol 4, as pronounced in the Court's account of the general principles of this provision in light of its previous case-law:

... Article 4 of Protocol No. 4, in this category of cases, is aimed at maintaining the possibility, for each of the aliens concerned, to assert a risk of treatment which is incompatible with the Convention – and in particular with Article 3 – in the event of his or her return and, for the authorities, to avoid exposing anyone who may have an arguable claim to that effect to such a risk. For that reason, Article 4 of Protocol No. 4 *requires the State authorities to ensure* that each of the aliens concerned has a *genuine and effective possibility of submitting arguments against his or her expulsion* ...<sup>132</sup>

The obligation for states to ensure *genuine and effective access to an asylum procedure* was restated with a particular view to the external borders of the Schengen area. In this context the ECtHR explained that the effectiveness of Convention rights requires that these states make available genuine and effective access to means of legal entry, in particular *border procedures* for those who have arrived at the border:

Those means should allow all persons who face persecution to *submit an application for protection*, based in particular on Article 3 of the Convention, under conditions which *ensure that the application is processed in a manner consistent with the international norms*, including the Convention.... In the absence of appropriate arrangements, the resulting possibility for States to refuse entry to their territory is liable to render ineffective all the Convention provisions designed to protect individuals who face a genuine risk of persecution.<sup>133</sup>

In a subsequent case where the applicants had been repeatedly refused entry into Poland and returned to Belarus, regardless of their express statements that they wanted to lodge an application for asylum in Poland, the ECtHR clarified the division of responsibilities between itself and the European states bound by the ECHR, thereby reconfirming the requirement under Article 3 that states establish an *asylum procedure with adequate guarantees and secure access* to that procedure for persons seeking asylum:

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<sup>131</sup> Cf. Sergio Carrera, 'The Strasbourg Court Judgment *N.D. and N.T. v. Spain*. A *Carte Blanche* to Push Backs at EU External Borders?', *EUI Working Paper RSCAS 2020/21*, Robert Schuman Centre for Advanced Studies (EUI 2020).

<sup>132</sup> *N.D. and N.T. v. Spain*, ECtHR Grand Chamber judgment of 13 February 2020, para 198 (italics added).

<sup>133</sup> *Ibid.*, para 209 (italics added); see also *Shahzad v. Hungary*, ECtHR judgment of 8 July 2021, para 62, and *D.A. and Others v. Poland*, ECtHR judgment of 8 July 2021, paras 65-8.

In cases concerning the return of asylum-seekers, the Court has observed that it does not itself examine actual asylum applications. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled .... The Court's assessment of the existence of a real risk must necessarily be a rigorous one ... and inevitably involves an examination by the competent national authorities and later by the Court of the conditions in the receiving country against the standards of Article 3 ....<sup>134</sup>

However, the exact content of the expelling State's duties under the Convention may differ depending on whether it removes applicants to their country of origin or to a third country. As to the latter situation, the ECtHR has specifically addressed the question of access to an asylum procedure where the prospective state of arrival is contemplating the refusal of entry of an asylum seeker on the basis of the '*safe third country*' notion, i.e. holding that another state is to be considered responsible for examining the request for protection. With a view to such situations, the ECtHR has indicated that where a contracting state seeks to remove an asylum seeker to a third country without examining the asylum request on the merits, the main issue before the expelling authorities is whether or not the individual will have *access to an adequate asylum procedure in the receiving third country*. This is so, according to the Court, because the removing country acts on the basis that it would be for the receiving third country to examine the asylum request on the merits if such a request is made to the relevant authorities of that country.<sup>135</sup>

The requirement of access to an asylum procedure as an integral part of the protection against *refoulement* according to Article 3 ECHR is therefore not altered in case of refusal of entry with a view to deportation to a 'safe third country'. Hence, the state obligation to secure access to such a procedure applies similarly in such situations, yet with the possibility that the deporting state can be discharged of its obligation provided that it is ascertained that the receiving third country will fulfil the requirement as a 'proxy' to the state determining deportation:

... in all cases of removal of an asylum-seeker from a Contracting State to a third intermediary country without examination of the asylum request on the merits, regardless of whether or not the receiving third country is an EU Member State or a State Party to the Convention, it is the duty of the removing State to examine thoroughly the question of whether or not there is a *real risk of the asylum-seeker being denied access*, in the receiving third country, to an *adequate asylum procedure*, protecting him or her against *refoulement*.

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<sup>134</sup> *M.K. and Others v. Poland*, ECtHR judgment of 23 July 2020, para 169 with references to *M.S.S. v. Belgium and Greece*, ECtHR Grand Chamber judgment of 21 January 2011, para 286, and *Ilias and Ahmed v. Hungary*, ECtHR Grand Chamber judgment of 21 November 2019, para 127.

<sup>135</sup> *M.K. and Others v. Poland*, paras 171-72 with references to *M.S.S. v. Belgium and Greece*, paras 342-43 and 362-68, and *Ilias and Ahmed v. Hungary*, paras 128 and 131; see also *D.A. and Others v. Poland*, paras 58-9.

If it is established that the existing guarantees in this regard are insufficient, Article 3 implies a duty that the asylum-seeker should not be removed to the third country concerned ...<sup>136</sup>

As regards the question of how to trigger the procedural obligations towards asylum seekers under the ECHR, the ECtHR has noted that in the specific context of migratory flows at borders, the wish to apply for asylum does not have to be expressed in a particular form. It may be expressed by means of a formal application, but also by means of any conduct which signals clearly the wish of the person concerned to submit an application for protection.<sup>137</sup>

The evidence on the actual conduct of border controls may sometimes be difficult to provide and assess in subsequent complaint proceedings. In a recent judgment concerning repeated rejections of asylum seekers at the border to Poland and returns of these persons to Belarus, the ECtHR set aside the respondent government's explanation of these occurrences and concluded, on the basis of the applicants' accounts as well as independent reports concerning the border situation, that the applicants' cases constituted an exemplification of a wider state policy of refusing entry to foreigners coming from Belarus, regardless of whether they were clearly economic migrants or whether they expressed a fear of persecution in their countries of origin. Those reports noted a consistent practice of: holding very brief interviews, during which the foreigners' statements concerning the justification for their seeking international protection were disregarded; emphasis being placed on the arguments that allowed them to be categorised as economic migrants; and misrepresenting the statements made by the foreigners in very brief official notes, which constituted the sole basis for issuing refusal-of-entry decisions and returning them to Belarus, even in the event that the foreigners in question had made it clear that they wished to apply for international protection in Poland.<sup>138</sup>

It can therefore be concluded that European states have a positive obligation to enable asylum seekers to submit their request for protection in order to ensure that the prohibition of *refoulement* is effective. This obligation has been specified in EU law where the Asylum Procedures Directive guarantees access to the determination procedure for persons intending to apply for international protection. First of all, an application can be 'made' without complying with any formal requirements, and national authorities must facilitate receipt and registration of such an application.<sup>139</sup> If an applicant has approached another authority than the one competent under national law, that authority must be trained and instructed to inform the applicant as to where

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<sup>136</sup> *M.K. and Others v. Poland*, para 173 (italics added).

<sup>137</sup> *N.D. and N.T. v. Spain*, para 180.

<sup>138</sup> *M.K. and Others v. Poland*, para 208; see also *D.A. and Others v. Poland*, paras 60-63 and 81.

<sup>139</sup> Article 6(1) of the EU Asylum Procedures Directive. See also Article 2(b) defining an application as a 'request' for protection made by a person who 'can be understood to seek refugee status or subsidiary protection status', as well as recitals 26-28 of the Directive.



and how the application may be lodged. Thus, member states must ensure that a person who has ‘made’ an application has an effective opportunity to ‘lodge’ it as soon as possible, and compliance with certain formalities may only be required at the lodging stage.<sup>140</sup> As soon as a person has made an application for international protection in the above sense, that person shall be allowed to remain in the member state for the sole purpose of the asylum procedure until the first instance decision has been made.<sup>141</sup>

In the Inter-American System, the scope of the right of access to the procedure has been developed through the right to seek asylum. Within the framework of its consultative competence, the IACtHR considered:

... for the right to seek asylum to take effect in practice, host States are required to allow persons to apply for asylum or refugee status, which is why such persons cannot be rejected at the border or returned without an adequate and individualised analysis of their claims with due guarantees. This requires, as the Court has stressed, the corresponding right of asylum-seekers to have a proper assessment by the national authorities of their applications and of the risk they may face in the event of refoulement. This implies, in its positive obligations aspect, that the State must allow entry to the territory and give access to the procedure for determining the status of asylum-seeker or refugee.<sup>142</sup>

### 3.2.3 Standards on the Conduct of Asylum Procedures

When it comes to the actual conduct of asylum procedures, the various human rights instruments and principles again come into play, most often based on the general requirement of the existence of *effective remedies* at the national level as a precondition for the effective implementation of internationally recognised human rights.

In European law, it is well-established in the case-law of the ECtHR that, in view of the importance attached to Article 3 ECHR and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority, an *independent and rigorous scrutiny* of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3, as well as a particularly prompt response. Importantly, the requirement of

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<sup>140</sup> Article 6(2)-(4) and Article 8 of the EU Asylum Procedures Directive.

<sup>141</sup> Article 9(1) of the EU Asylum Procedures Directive, cf. the definition of ‘applicant’ in Article 2(c). See also Article 9(2) and (3) concerning narrowly defined exceptions for subsequent applications and cases of extradition.

<sup>142</sup> *The institution of asylum and its recognition as a human right in the Inter-American System of Protection*, Advisory Opinion OC-25, Inter-American Court of Human Rights Series A No. 25, 30 May 2018, para 122. See also IACHR Res. 4/19, *Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, 7 December 2019, Principle 56.



‘rigorous scrutiny’ does not apply only to the ECtHR itself, but also, and indeed primarily, to the examination of asylum applications by national authorities. Furthermore, in order for a national remedy to be effective for the purposes of Article 13 it is also required that concerned asylum seekers should have access to a remedy with *automatic suspensive effect*.<sup>143</sup>

Thus, procedural guarantees deriving from the right to an effective remedy have to govern the initial decision-making as well as appeal procedures. Notably, however, the requirement of an effective domestic remedy does not extend to all situations where an asylum seeker claims to be at risk of being exposed to a violation of Article 3 ECHR in case of rejection of the application and deportation to his or her country of origin or any other country. According to the consistent interpretation of Article 13 by the ECtHR, the procedural protection under this provision only exists to the extent that the applicant has an ‘arguable claim’.<sup>144</sup>

In the Inter-American human rights system, the IACtHR has stated:

The refugee protection regime cannot exist separately from the human rights regime so that, with the parallel processes of international positivisation and progressive interpretative development by monitoring mechanisms, the international protection regime has become imbued with a human rights approach. An example of this is the incorporation of due process guarantees in refugee status determination procedures.<sup>145</sup>

Likewise, the bodies of the Inter-American human rights system have considered that in cases of persons seeking asylum or the expulsion or deportation of a refugee, the analysis of compliance of the state’s obligations under the American Convention entails a combined assessment of the rights to seek and be granted asylum (Article 22.7), prohibition of refoulement (Article 22.8) with the rights to a fair trial (Article 8) and judicial protection (Article 25), which guarantees that the person seeking refugee status has access to due process and judicial protection.<sup>146</sup> The Inter-American Commission has considered that in order to safeguard the ultimate goals of the rights to seek and be granted asylum and the prohibition of *refoulement*, which are the protection of life, integrity, and personal liberty of those persons seeking international protection, those rights include not only substantive, but also procedural obligations. In the case of the *Pacheco Tineo*

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<sup>143</sup> Cf. *Jabari v. Turkey*, ECtHR judgment of 11 July 2000, paras 39 and 50; *NA. v. United Kingdom*, ECtHR judgment of 17 July 2008, para 111; *M.S.S. v. Belgium and Greece*, para 293 with references to previous ECtHR case-law; *M.K. and Others v. Poland*, para 143.

<sup>144</sup> Cf. *M.S.S. v. Belgium and Greece*, para 288; *M.K. and Others v. Poland*, para 219.

<sup>145</sup> *The institution of asylum and its recognition as a human right in the Inter-American System of Protection*, Advisory Opinion OC-25, Inter-American Court of Human Rights Series A No. 25, 30 May 2018, para 42.

<sup>146</sup> *Pacheco Tineo Family v Bolivia* (Report on Merits No. 136/11) IACHR Case 12.474, 31 October 2011, para 113. On this judgment, see also Lourdes Peroni, ‘On the Road to Substantive Equality: Due Process and Non-discrimination at San José (*Nadege Dorzema and Pacheco Tineo*)’, Chapter 14 in Marie-Bénédicte Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015).

*Family*, the Commission asserted that any refugee determination process implies an assessment and a decision on the possible risk of impairment of the most basic rights, such as the rights to life, personal integrity and personal liberty.<sup>147</sup>

Finally, the African Commission on Human and Peoples' Rights has also held that procedural guarantees must be applied in the framework of procedures relating to asylum seekers in accordance with the 'right to a fair trial', established in Article 7(1) of the African Charter on Human and Peoples' Rights.<sup>148</sup>

In contrast, the jurisprudence of the Human Rights Committee has been based on the fact that certain procedural parameters apply to the refugee status determination procedure by virtue of Article 7 (or 6) of the ICCPR, concerning the harm involved, and not by virtue of the standards developed under ICCPR Article 14 on the right to a fair trial. This approach is similar to that taken by the ECtHR in relation to Article 6 ECHR.<sup>149</sup>

The specific standards on the conduct of asylum procedures that have been established in these developments within the various human rights systems address a number of aspects that are considered to be crucial to the effective fulfilment of the human rights obligations aimed at protecting asylum seekers and persons in need of international protection. In addition to the right of access to an examination procedure, as discussed separately in section 3.2.2, these standards include

- Screening and identification of protection needs as well as special needs of individuals
- Access to legal assistance and representation
- Access to translation or interpretation
- Confidentiality of the asylum procedure
- Individualised personal interviews
- Information and the duration of proceedings
- Adequate burden of proof
- Psychological assistance
- Appeal proceedings with suspensive effect
- Specific provisions for children and adolescents.<sup>150</sup>

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<sup>147</sup> Ibid., para 136. See also *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination*, IACHR, System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1, 28 February 2000, para 52.

<sup>148</sup> See *Kenneth Good v. Republic of Botswana* (Communication No. 313/05) African Commission on Human and Peoples' Rights, 12-26 May 2010, paras 160-80; and *Organisation mondiale contre la torture & Others v. Rwanda* (Communication Nos. 27/89; 46/91; 49/91; 99/93) African Commission on Human and Peoples' Rights, 1996, para 34.

<sup>149</sup> Cf. David James Cantor, 'Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence' (2015) 34(1) *Refugee Survey Quarterly* 87.

<sup>150</sup> On the case-law within the Inter-American, the European and the African human rights systems, see Álvaro Botero and Jens Vedsted-Hansen, 'Asylum Procedure', in Cathryn Costello, Michelle Foster and Jane McAdam (eds.), *The Oxford Handbook of International Refugee Law* (OUP 2021) 599-605.



## 4 THE SCOPE OF INTERNATIONAL PROTECTION

This section catalogues and discusses standards relating to the scope of international protection in both international and regional regimes, encompassing refugee status under the Refugee Convention, complementary protection under international human rights law, and the scope of protection under regional regimes.

### 4.1 International Refugee Law Standards

#### 4.1.1 The Refugee Convention

The inclusion criteria for protection under the Refugee Convention are contained in Article 1A(2), which provides that a refugee is a person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The Convention definition of refugee was expanded in two key respects by the 1967 Protocol. First, the Protocol lifted the temporal restriction built into the original Article 1A(2) definition to render the definition applicable to events after 1 January 1951.<sup>151</sup> Second, the 1967 Protocol lifted a geographical restriction contained in Article 1B(1)(a) of the Refugee Convention limiting the Convention's scope to events in Europe.<sup>152</sup>

A number of limits to the scope of international protection are built into the Convention text. Article 1D carves out from Convention protection refugees who are receiving the protection of other United Nations agencies. Most notably, the effect of Article 1D is to prevent the application of the Refugee Convention to refugees under the protection of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).<sup>153</sup>

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<sup>151</sup> Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 article 1(2).

<sup>152</sup> 1967 Protocol article 1(3).

<sup>153</sup> Susan Akram, *UNRWA and Palestinian refugees* (OUP Oxford 2014).

Article 1F of the Refugee Convention operates to exclude certain classes of refugees from protection notwithstanding their inclusion under Article 1A(2). Article 1F provides that the Convention does not apply where there are serious reasons to consider a person has committed war crimes, crimes against humanity, a serious non-political crime or 'acts contrary to the purposes and principles of the United Nations'.<sup>154</sup>

Finally, Article 1C exhaustively sets out the circumstances in which an asylum state may end a refugee's status. These grounds are generally divided into two broad categories: Article 1C(1-4) relate to the voluntary acts of the refugee in reacquiring national protection;<sup>155</sup> while Article 1C(5-6) relate to fundamental changes in circumstances in the country of origin such that international protection is no longer needed.<sup>156</sup>

In sum, the Refugee Convention provides the international definition of refugeehood to a person outside her/his country with a well-founded fear of persecution on a Convention ground. Refugees under the protection of UNRWA do not benefit from the Convention while those who have committed particularly serious international and non-political crimes are excluded from protection. Finally, the Convention allows for the cessation of status where a refugee voluntarily reacquires the protection of her/his country of origin, or where the circumstances leading to a protection need cease to exist.

The Refugee Convention definition has given rise to a number of questions on the scope of protection afforded. While it is beyond the scope of this working paper to address all of these in detail, a couple of developments of particular relevance to contemporary asylum governance are briefly outlined here. First, the protection of displaced persons fleeing general situations of conflict or violence remains a contested question under the Convention definition. Asylum states have tended to interpret Article 1A(2) in individualised terms, requiring a personal risk of persecution for the grant of refugee status. As a result, asylum states have in some cases used the concept of 'temporary protection' to provide group-based protection in mass influx situations for those who fall outside the refugee definition but nonetheless face a risk of generalised violence at home. Most notably, Turkey in October passed the Temporary Protection Regulation (TPR),<sup>157</sup> which

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<sup>154</sup> Refugee Convention Article 1F(a)-(c).

<sup>155</sup> UNHCR, *Note on the Cessation Clauses 1997* para 5; Jeremy R Tarwater, 'Analysis and case studies of the ceased circumstances cessation clause of the 1951 refugee convention' (2000) 15 *Georgetown Immigration Law Journal* 563, 564.

<sup>156</sup> Article 1C(5) relates to refugees with citizenship in their country of origin, while Article 1C(6) relates to stateless refugees. Maria O'Sullivan, *Refugee Law and Durability of Protection: Temporary Residence and Cessation of Status* (Routledge 2019) 48-9; Hathaway, 'The right of states to repatriate former refugees' 177.

<sup>157</sup> Temporary Protection Regulation, (Official Gazette No. 29153 of 22 October 2014).

provides Syrians in Turkey with a national legal status encompassing access to health care, the labour market, education, social assistance and permission to stay on a temporary basis.<sup>158</sup>

Second, due to the 'nexus' requirement tying persecution to a Convention ground, many countries have in recent decades established 'complementary' or, in the case of the EU asylum *acquis*, 'subsidiary' protection regimes on the basis of international human rights law obligations. As *non-refoulement* obligations under international human rights law protect any person against return to torture or other serious ill-treatment, this form of protection has emerged to provide for the protection of people in refugee-like situations who do not meet the nexus requirement of the Refugee Convention.<sup>159</sup>

Third, on its face the Convention definition does not make explicit whether a refugee must meet the inclusion criteria throughout the country of origin, or whether asylum states may legitimately carve out internal protection alternatives (IPA) or internal flight alternatives (IFA). As a result, many asylum states rely on IPA/IFA concepts in refusing refugee status, as well as when invoking cessation.<sup>160</sup>

## 4.2 Regional Protection Standards<sup>161</sup>

### 4.2.1 European Law

At the level of EU law, the Qualification Directive expands the scope of protection in its provisions relating to 'subsidiary protection', in addition to transposing the Refugee Convention definition, extending protection to any person facing a real risk of 'serious harm', defined as:

- (a) the death penalty or execution; or

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<sup>158</sup> Meltem Ineli-Ciger, 'How Have the European Union and the EU Asylum Acquis Affected Protection of Forced Migrants in Turkey?: An Examination in View of the Turkish Law on Foreigners and International Protection and the EU-Turkey Statement of March 2016', *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis* (The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis, Brill Nijhoff 2018). See also Meltem Ineli-Ciger and Ozgenur Yigit, *Turkey - Country Fiche* (October 2020) available at [https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche\\_Turkey\\_Final\\_Pub.pdf](https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_Turkey_Final_Pub.pdf) accessed 16 August 2021.

<sup>159</sup> See further Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007); Jane McAdam, 'Complementary Protection' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *Oxford Handbook of International Refugee Law* (OUP 2021) 661-677.

<sup>160</sup> James C Hathaway, 'International refugee law: The Michigan guidelines on the internal protection alternative' (1999) 21 *Michigan Journal of International Law* 131; UNHCR, 'Guidelines on International Protection: Internal Flight or Relocation Alternative within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees' (23 July 2003) UN doc HCR/GIP/03/04, para 5.

<sup>161</sup> A more detailed analysis of regional protection standards will be undertaken in Deliverable 5.2: Working Paper – The Right of Asylum in Comparative Regional Perspective.

- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.<sup>162</sup>

Perhaps most notably, the EU Qualification Directive extends the scope of subsidiary protection to include situations of indiscriminate violence, thereby including a broader set of risks than the Refugee Convention definition of refugeehood.

Following the use of the concept of 'temporary protection' with respect to asylum seekers from Bosnia and Kosovo in Europe in the 1990s,<sup>163</sup> the 2001 Temporary Protection Directive provides an exceptional procedure for group-based temporary protection in mass influx situations.<sup>164</sup> However, the Directive has never been activated and is in fact slated for repeal under the New Pact on Asylum and Migration.

#### 4.2.2 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

The 1969 OAU Convention, to which South Africa is a party, is generally considered to provide a more expansive definition of refugeehood than the 1951 Convention.<sup>165</sup> In addition to restating Article 1A(2), its Article I(2) provides:

- (2) The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual

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<sup>162</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted article 15.

<sup>163</sup> Morten Kjaerum, 'Temporary Protection in Europe in the 1990's' (1994) 6 International Journal of Refugee Law 444; Joly, 'Temporary protection within the framework of a new European asylum regime'; Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime'; UN High Commissioner for Refugees (UNHCR), A Comprehensive Response to the Humanitarian Crisis in the former Yugoslavia, 24 July 1992, HCR/IMFY/1992/2, available at: <https://www.refworld.org/docid/438ec8aa2.html> [accessed 26 March 2020].

<sup>164</sup> Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

<sup>165</sup> On asylum governance in South Africa, see Fatima Khan and Nandi Rayner, South Africa - Country Fiche (October 2020) available at [https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche\\_South-Africa\\_Final\\_Pub.pdf](https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_South-Africa_Final_Pub.pdf) accessed 16 August 2021.

residence in order to seek refuge in another place outside his country of origin or nationality.<sup>166</sup>

Scholars have highlighted a number of expansions in the OAU Convention definition, as compared to the Refugee Convention. First, the second limb of the definition contained in Article I(2) relies on the general conditions in the refugee's country of origin, thus anchoring refugeehood in widespread harms of conflict or violence, rather than an individualised risk of persecution.<sup>167</sup> Second, the reference to 'in either part or the whole' of the country of origin has been interpreted to preclude the use of IPA/IFA concepts prevalent in other regions of the world.<sup>168</sup> Finally, the OAU Convention definition has been understood as well-suited to group-based refugee status determination and protection of refugees in mass influx situations.<sup>169</sup>

### 4.2.3 Cartagena Declaration

In Latin America, the 1984 Cartagena Declaration on Refugees has emerged as a highly influential piece of soft law that has served to expand the scope of protection for refugees through uptake in national legislation, including in Brazil.<sup>170</sup> Inspired by the definition of refugeehood put forward by the OAU Convention, the Cartagena Declaration builds on the Refugee Convention definition to include:

persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.<sup>171</sup>

A number of elements expand the scope of protection under the Cartagena Declaration over the Refugee Convention definition. First and foremost, the five 'situational events' that give rise to refugeehood are more reflective of the realities of contemporary displacement than individualised persecution on a Convention ground. The scenarios contained in Conclusion III (3) are characterised by 'indiscriminate, unpredictable or collective nature of the risks they present' both

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<sup>166</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45.

<sup>167</sup> Tamara Wood, 'Expanding Protection in Africa? Case studies of the implementation of the 1969 African refugee convention's expanded refugee definition' (2014) 26 International Journal of Refugee Law 555, 559.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> UNHCR, *Summary Conclusions on the interpretation of the extended refugee definition in the 1984 Cartagena Declaration; roundtable 15 and 16 October 2013, Montevideo, Uruguay*, 7 July 2014. On asylum governance in Brazil, see Natália Medina Araújo, Brazil - Country Fiche (January 2021) available at [https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche\\_BRAZIL\\_Final\\_Pub.pdf](https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_BRAZIL_Final_Pub.pdf) accessed 16 August 2021.

<sup>171</sup> *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, Conclusion III (3).



to individuals and groups.<sup>172</sup> Asylum seekers need only demonstrate one of the five situational events to meet this criterion and, as with the OAU Convention, this definition is based on objective and often generalised conditions in the country of origin rather than an individualised fear of persecution.<sup>173</sup>

Moreover, the risk standard within the Cartagena Declaration is considered lower than that of the Refugee Convention. Rather than the requirement of 'well-founded fear', the 'threat' requirement requires a lower threshold of proof. In general, proximity to the situational event is sufficient to justify international protection under the Cartagena definition.<sup>174</sup>

Regional initiatives have followed the Cartagena Declaration every ten years.<sup>175</sup> Most notably, the 2004 Mexico Declaration and Plan of Action affirmed the commitment of Latin American states to keep their borders open to guarantee the protection and security of those in need of international protection. In December 2014, Brazil adopted the Brazil Declaration and Plan of Action with the aim of strengthening national bodies for the determination of refugee status, including at border areas.<sup>176</sup> Brazil incorporated elements of the Cartagena Declaration definition into its national legislation in 1992, albeit in a fairly circumscribed way. Following the San Jose Declaration of 1994, Brazil's Refugee Law 9.474 of 1997 incorporated the Refugee Convention definition and, on the basis of the Cartagena Declaration, recognises that protection is due to any individual that 'due to gross and generalized violations of human rights is forced to leave his/her country of nationality to seek refuge in another country'.<sup>177</sup>

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<sup>172</sup> UNHCR, *Summary Conclusions on the interpretation of the extended refugee definition in the 1984 Cartagena Declaration* para 8.

<sup>173</sup> Eduardo Arboleda, 'The Cartagena Declaration of 1984 and its Similarities to the 1969 OAU Convention-A Comparative Perspective' *International Journal of Refugee Law* 7 (1995) 87.

<sup>174</sup> UNHCR, *Summary Conclusions on the interpretation of the extended refugee definition in the 1984 Cartagena Declaration* para 28.

<sup>175</sup> Gilberto M. A. Rodrigues, South America and the Cartagena Regime: a comprehensive approach to forced migration responses, ASILE Forum, 10 November 2020, available at <https://www.asileproject.eu/south-america-and-the-cartagena-regime/> accessed 16 August 2021.

<sup>176</sup> Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America. Mexico City, 16 November 2004; Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean. Brasilia, 3 December 2014. See further Roberto Cortinovis & Lorenzo Rorro, Country Note BRAZIL (ASILE Country Note, April 2021) available at [https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note\\_Brazil.pdf](https://www.asileproject.eu/wp-content/uploads/2021/05/Country-Note_Brazil.pdf) accessed 16 August 2021.

<sup>177</sup> Lei no 9.474, de 22 de julho de 1997, 'Define mecanismos para a implementação do Estatuto dos Refugiados de 1951, e determina outras providências', Art. 1 (III) (Brazil). See further Michael Reed-Hurtado, *The Cartagena declaration on refugees and the protection of people fleeing armed conflict and other situations of violence in Latin America* (UNHCR, Division of International Protections, 2013) 17.

## 5 THE CONTENT OF INTERNATIONAL PROTECTION

The content of protection for refugees and other persons in need of protection is defined by a rather complex regime of interacting and mutually complementary standards in the Refugee Convention and the various universal and regional human rights treaties. The following accounts for the principles and the most important standards of this international regime of rights to be accorded to Convention refugees and persons granted complementary or subsidiary protection.<sup>178</sup> In this regard, some of the protection standards are of particular relevance to the realisation of the GCR objective of enhancing refugee self-reliance.<sup>179</sup>

Importantly, it has to be kept in mind that Bangladesh and Jordan are not parties to the Refugee Convention or its 1967 Protocol.<sup>180</sup> Furthermore, Turkey has ratified the Convention with the geographical limitation according to which it has no protection obligations towards non-European refugees, and Turkey maintained this geographical limitation when acceding to the 1967 Protocol.

### 5.1 Gradual Acquisition of Rights under the Refugee Convention

The protection standards or entitlements applying to refugees under the Refugee Convention increase gradually according to the factual and legal nature of the refugee's attachment to the country of asylum. Five attachment criteria are decisive for the acquisition of rights under the Convention system: (1) Refugees who are subject to a state's jurisdiction, yet with no additional connection to that state; (2) Refugees who are physically present in the territory of a state; (3) Refugees who are lawfully present in the territory; (4) Refugees who are lawfully resident in the country; and finally (5) Refugees who have durable residence or even formal domicile in the country.<sup>181</sup>

The system of gradual acquisition of rights implies that the country of asylum will not be immediately obliged to provide all the entitlements conferred on refugees by the Convention. However, due to the

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<sup>178</sup> This section draws significantly on Jens Vedsted-Hansen, 'Refugees, Asylum-Seekers and Migrant Workers', in Catarina Krause and Martin Scheinin (eds.), *International Protection of Human Rights: A Textbook* (2nd rev. ed., Åbo Akademi University Institute for Human Rights, Turku 2012) 331-52.

<sup>179</sup> Global Compact on Refugees (UN doc. A/73/12 (Part II), affirmed by Resolution 73/151 of the UN General Assembly, adopted 17 December 2018), para 7.

<sup>180</sup> See further Borhan Uddin Khan and Muhammad Mahbubur, Bangladesh - Country Fiche (October 2020) available at [https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche\\_Bangladesh\\_Final\\_Pub.pdf](https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_Bangladesh_Final_Pub.pdf) accessed 16 August 2021; Gerasimos Tsourapas and Simon Verduijn, Jordan - Country Fiche (October 2020) available at [https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiches\\_Jordan\\_Pub.pdf](https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiches_Jordan_Pub.pdf) accessed 16 August 2021.

<sup>181</sup> For a detailed account of the meaning of these criteria, see James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 173-219; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th ed., OUP 2021) 595-9.

declaratory nature of the recognition of refugee status,<sup>182</sup> some of the protection standards established under the Convention take immediate effect for each and every refugee, irrespective of whether the refugee status of the person in question has been formally recognised, and whether the person in question has been granted a residence permit, provided only that the refugee is within the jurisdiction of the relevant state.

The protection standards of immediate application are those which are formulated as not being contingent on the individual refugee's specific attachment to or formal legal status in the host country. In addition, it may follow from their very nature that such standards must be provided immediately if their protective purpose is not to be nullified. The primary example of this is the prohibition of *refoulement* in Article 33 of the Refugee Convention and the additional *non-refoulement* provisions in human rights treaties. Needless to say, the protection laid down in these provisions would be rendered meaningless if it were to apply only once an asylum seeker has been formally recognised as a refugee or a beneficiary of subsidiary protection or issued with a particular kind of residence permit by the host state.

Under the Refugee Convention, some of the protection standards are reflecting the specific predicament of refugees, such as the prohibition of *refoulement* (Article 33), the exemption from penalties for unlawful entry or presence (Article 31) and the issuance of travel documents (Article 28). Other Convention standards are based on reference to the rights accorded to either the citizens of the asylum country<sup>183</sup> or most-favoured foreign nationals<sup>184</sup> or the standards applicable to aliens in general in that country.<sup>185</sup>

As a result of this system of gradual acquisition of contingent rights, the Refugee Convention provides more robust protection standards than the general human rights treaties with regard to a number of issues. At the same time, however, other human rights are not, or only sporadically, protected by the Refugee Convention. As a result, the comprehensive and effective protection of Convention refugees crucially depends on supplementary provisions in general human rights treaties. In addition, persons in need of international protection beyond the scope of the Refugee Convention are exclusively covered by the general protection standards laid down in universal and regional human rights treaties.

As yet another difference between the Refugee Convention and the general human rights treaties, it should be mentioned that the monitoring mechanism under the former is relatively vague since Article 35 of the Refugee Convention merely obliges states parties to cooperate with the Office of the

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<sup>182</sup> See section 3.1.1 *supra*.

<sup>183</sup> See, in particular, Articles 16 (access to courts), 20 (rationing), 22 (public education) and 23 (public relief and assistance).

<sup>184</sup> Articles 15 (right of association) and 17 (wage-earning employment).

<sup>185</sup> Articles 18 (self-employment), 19 (practice of liberal professions), 21 (housing) and 26 (freedom of movement).

UN High Commissioner for Refugees and in particular to ‘facilitate its duty of supervising the application of the provisions’ of the Refugee Convention.<sup>186</sup> This is in itself likely to reduce the effectiveness of the Refugee Convention as compared to the universal and regional human rights treaties for which monitoring is expressly entrusted to international treaty bodies, to most of which it is even possible to lodge individual complaints if the state party has accepted the competence of the relevant treaty body to examine such applications.

The protection standards under the Refugee Convention shall be illustrated by examining a number of specific entitlements for refugees in the following subsections: the right to work, the right to education, the right to freedom of movement, the rights to housing and to social assistance, and the right to travel documents. Apart from the latter, these rights are not only protected by the Refugee Convention, but also under general human rights treaties which shall be included with a view to comparison and in order to elucidate the limitation of protection standards in those host countries that are not, or not fully, parties to the Refugee Convention. Furthermore, it should be mentioned that the right to family reunification is under certain conditions protected by human rights treaties, but not provided for in the Refugee Convention.

### 5.1.1 Right to Work

The right to work, i.e. the right to access the labour market of the host country, is one of the protection standards which the Refugee Convention reserves for refugees with a more stable and formalised attachment to their country of asylum.<sup>187</sup> Under Article 17 of the Convention, the state shall accord to refugees *lawfully staying* in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances as regards the right to engage in wage-earning employment. Due to this contingency, the actual impact of the standard in Article 17 will inevitably vary from country to country, and perhaps over time within the same country of asylum depending on the state’s undertaking of obligations or adoption of policies to treat non-citizens as most-favoured foreign nationals. Nonetheless, the principle is clear insofar as refugees shall be treated in the same manner as those foreign nationals who are granted the most favourable treatment as regards access to the labour market.

Article 17 of the Refugee Convention is supplemented by Article 18 concerning the right to self-employment in agriculture, industry, handicrafts and commerce, and by Article 19 concerning the

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<sup>186</sup> Cf. Walter Kälin, ‘Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond’, in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP 2003) 613-66; Marjoleine Zieck, ‘Article 35 of the 1951 Convention/Article II of the 1967 Protocol’, in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) 1459-1510.

<sup>187</sup> For a detailed account on the right to work for both asylum seekers and refugees, see Cathryn Costello and Colm O’cinnéide, ‘The Right to Work of Asylum Seekers and Refugees’ (2021) ASILE Project Working Paper.

right to practise liberal professions based on diplomas recognised by the competent authorities of the asylum state. While Article 19 requires the refugee to be *lawfully staying*, similar to Article 17, the right to self-employment under Article 18 applies already from the moment the refugee is *lawfully present* in the territory. The protection standard in both Article 18 and Article 19 is that refugees must be treated as favourably as possible and, in any event, not less favourably than aliens generally in the same circumstances. Given its wording and the context of the two subsequent provisions of the Refugee Convention, Article 17 is to be interpreted as covering all kinds of employment.<sup>188</sup>

The standard of treatment stipulated by Article 17 means that refugees lawfully staying shall have the same rights as those foreign nationals who are covered by special bi- or multilateral schemes on labour migration, such as those adopted within the EU and the European Economic Area (EEA). This level of entitlement is crucial to refugees' access and integration into the labour market because of the widespread tendency to conclude agreements on the free movement of workers between states. Some states have been reluctant to accept this interpretation of Article 17.<sup>189</sup> However, it is clear from the wording of Article 17 that it implies an obligation to treat refugees on equal terms with foreign nationals falling under such agreements on preferential treatment.<sup>190</sup> Reservations initially made against Article 17 demonstrate that it was indeed understood in this manner by states when concluding the Refugee Convention, hence supporting this interpretation.<sup>191</sup>

The condition that the refugee must be *lawfully staying* may cause some uncertainty as to when the right to access the labour market must be fulfilled. Whereas the exact criterion for a non-citizen being 'lawfully staying' may depend on differences between various domestic systems, states are not free to adopt rules that restrict refugees' right to take up employment. On the one hand, it is not in itself sufficient for the refugee to be lawfully present in the country and perhaps even holding a residence permit. On the other hand, it cannot be required that the residence permit is permanent or with any specific duration of validity. The most important criterion is that the refugee has obtained regularised residence, normally by way of a residence permit regardless whether it is based on formal recognition

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<sup>188</sup> Cf. James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 949-50 with further references; Alice Edwards, 'Article 17', in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) 968.

<sup>189</sup> Cf. James C. Hathaway and John A. Dent, *Refugee Rights: Report on a Comparative Survey* (Toronto: York Lanes Press, 1995) 27. Within the CEAS this restrictive approach has been abandoned by the unconditional access to employment for beneficiaries of international protection, including Convention refugees, according to Article 26 of Directive 2011/95 of 13 December 2011 on standards for the qualification of third country-nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 2011 L 337/9.

<sup>190</sup> Cf. Paul Weis (ed.), *The Refugee Convention, 1951* (CUP 1995) 129-30 and 148; James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 951-6; Alice Edwards, 'Article 17', in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) 966.

<sup>191</sup> Cf. Paul Weis (ed.), *The Refugee Convention, 1951* (CUP 1995) 141-45. Among the initial reservations against Article 17 were those made by Sweden, Finland, Denmark and Norway to the effect that these states were not to be bound to treat refugees at the same level as that following from the special Nordic agreements on preferential treatment of nationals from the Nordic countries.

of refugee status, and has become established or settled in a more durable manner with no prospect of termination of the stay.<sup>192</sup> In any event, Article 17(2) expressly stipulates that restrictions on access to the labour market cannot apply for more than three years after the individual refugee's taking up residence in the country.

In addition to the Refugee Convention, Article 6 of the ICESCR protects the right to take up employment by restricting states' possibilities to prohibit individuals or groups from taking paid employment. The personal scope of this provision is different from that of the Refugee Convention in that the ICESCR applies to each and every person within the state's jurisdiction. Thus, the Covenant can be invoked by any foreign national, refugee or not. While the formal residence basis cannot in itself be a reason for exclusion from the labour market, Article 4 leaves room for exception by allowing states to limit the enjoyment of the rights protected under the Covenant. Article 4 may for instance be invoked in order to refuse refugees under special temporary protection arrangements a work permit for a certain period of time if found necessary in consideration of the general employment situation in the host country. However, exclusion from the labour market cannot continue over time for a particular group of persons.<sup>193</sup> The state will have to give very strong reasons if considerable time lapses before they are granted work permits.

It can therefore be concluded that the Refugee Convention as well as the ICESCR provide for the right to access the labour market when refugees and other persons in need of protection have been staying in the host country for a certain period of time. States have considerable leeway to determine for how long time they want to exclude these categories of persons from the labour market and to determine which conditions they must fulfil in order to access the labour market, in particular under the ICESCR. Nonetheless, such exclusion cannot be in force for an indefinite period of time, and it requires careful balancing of social considerations against the interests of the persons concerned.

### 5.1.2 Right to Education

The right to public education is among the Refugee Convention standards that states are obliged to provide to refugees regardless of their formal status and attachment to the country of asylum.<sup>194</sup> Article 22 of the Convention stipulates that states shall accord to refugees the same treatment as is

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<sup>192</sup> Cf. James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 212-16 and 957-8; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th ed., OUP 2021) 597; Alice Edwards, 'Article 17', in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) 964-66.

<sup>193</sup> Cf. Morten Kjærum, 'Temporary Protection in Europe in the 1990s' (1994) 6 *International Journal of Refugee Law*, 444-56.

<sup>194</sup> Cf. Paul Weis (ed.), *The Refugee Convention, 1951* (CUP 1995) 164 and 170; James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 746-7; Andreas Zimmermann and Jonas Dörschner, 'Article 22', in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) 1029-30.

accorded to nationals with respect to *elementary education*. As regards education other than elementary, such as access to studies and award of scholarships, refugees are entitled only to treatment as favourable as possible, and not less favourable than that accorded to aliens generally in the same circumstances. Thus, the right to elementary education extends to every refugee, normally implying every child who is a refugee, and this protection standard is guaranteed at the maximum level of entitlement under the Refugee Convention, i.e. the citizenship standard of the country of asylum.<sup>195</sup>

While this standard of treatment may appear quite demanding on states, it should be noted that other human rights treaties actually provide protection at a corresponding level with regard to the right to elementary education. According to Article 13 ICESCR, everyone has the right to education, and primary school instruction shall be compulsory and available free to all. This right must therefore generally be fulfilled for refugees – and other persons in need of protection – at the same level as for other children in a given host country. However, the ICESCR allows some flexibility for less developed states as regards the fulfilment of the right to education for refugee children, due to the progressive realisation obligation in Article 2(1) and possibly even the exception clause concerning non-citizens in Article 2(3) of the Covenant.<sup>196</sup>

The CRC implies a similar obligation for states as Article 28 recognises the right of the child to education, emphasising that this right must be achieved on the basis of equal opportunity, and stipulates that states shall make primary education compulsory and available free to all. This provision must be interpreted and applied in the light of Article 2 CRC which lays down the general principle of equal treatment of all children within the state's jurisdiction.<sup>197</sup> On this basis, formal residence status must be considered immaterial to the enjoyment of the protection standards under the CRC.

At the regional level in Europe, Article 2 ECHR Protocol 1,<sup>198</sup> taken together with Article 14 ECHR, provides for an individual right to elementary education that has to be secured to all children regardless of their formal status.<sup>199</sup> Access to free education is thus a basic right for children being refugees or otherwise in need of protection, as well as for children seeking asylum, if the country in which they find themselves has an elementary school system available to all. It would be incompatible with these international standards if particular groups of children were to be excluded from existing systems of elementary education. The prohibition of discrimination does not seem to

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<sup>195</sup> Cf. James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 748-9.

<sup>196</sup> Cf. James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 749-54; Manfred Nowak, 'The Right to Education', in Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (2nd ed., Martinus Nijhoff Publishers 2001) 258-60.

<sup>197</sup> Cf. Geraldine van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995) 245-48.

<sup>198</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 20 March 1952, entry into force 18 May 1954, ETS No. 9 (ECHR Protocol 1).

<sup>199</sup> Cf. William A. Schabas, *The European Convention on Human Rights. A Commentary* (OUP 2015) 996 and 1005-6.



leave room for preventing particular groups of persons from receiving elementary education as is otherwise considered necessary and suitable in the host country.

### 5.1.3 Freedom of Movement

Article 26 of the Refugee Convention entitles refugees to choose their place of residence and to move freely within the territory of the country of asylum, provided that they are *lawfully present* in the territory. Thus, the right to freedom of movement is contingent on the refugee's formal status of having lawful presence in the host country. On the other hand, this protection standard applies from an earlier point in time than is the case for the socio-economic rights under the Refugee Convention, such as the right to work discussed above in section 5.2, and the rights to housing and to social assistance as discussed below in sections 5.5 and 5.6.

However, refugees' right to freedom of movement and to choose their place of residence is not absolute. According to Article 26 of the Refugee Convention, these rights may be subject to any regulations applicable to aliens generally in the same circumstances. For example, if the state of asylum has created zones around military installations where non-citizens are not permitted to enter, such prohibition will apply to refugees on equal terms with other non-citizens who are lawfully present in the country.<sup>200</sup> In addition, while Article 26 does not contain a restriction clause, certain provisional restrictions on the movements of refugees unlawfully in the territory may be permissible under Article 31(2) of the Refugee Convention, provided that they are necessary and only until their status has been regularised or they obtain admission into another country.<sup>201</sup>

Due to this narrowly delimited possibility of restricting refugees' right to freedom of movement, this right seems to be better protected in the Refugee Convention than in general human rights treaties. According to Article 12(3) of the International Covenant on Civil and Political Rights (ICCPR), the right to freedom of movement and choice of residence can be subject to such restrictions as are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the Covenant.<sup>202</sup> Restrictions are permissible under similar conditions according to Article 2(3) ECHR Protocol 4, provided they are considered necessary in a democratic society.<sup>203</sup>

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<sup>200</sup> Cf. James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 877-80; Reinhard Marx, 'Article 26', in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) 1160.

<sup>201</sup> Cf. James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 870-72; Reinhard Marx, 'Article 26', in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) 1160-63; Gregor Noll, 'Article 31', in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) 1266-73.

<sup>202</sup> Cf. Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev. ed., N.P. Engel 2005) 270-82.

<sup>203</sup> Cf. William A. Schabas, *The European Convention on Human Rights. A Commentary* (OUP 2015) 1062-5.



#### 5.1.4 Right to Housing

Insofar as matters relating to housing are under some form of public control ('is regulated by laws or regulations or is subject to the control of public authorities'), Article 21 of the Refugee Convention stipulates that states must treat refugees who are *lawfully staying* in their territory as favourably as possible and, in any event, not less favourably than aliens generally in the same circumstances.

Although only applicable to refugees with a certain attachment and formal residence status, Article 21 of the Refugee Convention will often imply higher standards for the protection of refugees' access to housing, as well as conditions in the housing market, than the general standard under human rights treaties. Thus, Article 11(1) ICESCR merely entitles the individual to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The corresponding state obligation is to take appropriate steps to ensure the realisation of this right, in line with the general obligation under Article 2(1) ICESCR to progressively realise the Covenant rights to the maximum of states' available resources.

#### 5.1.5 Right to Social Assistance

According to Article 23 of the Refugee Convention, states shall accord to refugees *lawfully staying* in the territory the same treatment with respect to public relief and assistance as is accorded their nationals. Like most other socio-economic rights under the Refugee Convention, this rather demanding standard of treatment is reserved to refugees who are staying with a certain duration and formal status in their country of asylum.

Therefore, the Refugee Convention normally provides for a better protection standard than the non-absolute right to an adequate standard of living according to Article 11(1) ICESCR. Here again, as stipulated in Article 2(1) of the Covenant, the state obligation under Article 11(1) is to take appropriate steps to ensure the progressive full realisation of the right to an adequate living standard, to the maximum of the state's available resources. In addition, the entitlement under Article 23 of the Refugee Convention is more secure than that under the Covenant in less developed countries, given the option for such states to exempt non-citizens from economic rights according to Article 2(3) of the Covenant.

It may be a matter of crucial importance how to distinguish 'public relief and assistance' under Article 23 from 'social security' for which Article 24 of the Refugee Convention lays down a more qualified right to equal treatment with nationals of the country of asylum. There may be certain differences

between the designation of the various allowances in domestic systems of social security and welfare. However, it can generally be assumed that basic welfare benefits, including maintenance grants and health care, provided by public authorities, which are tax-financed and may be acquired regardless of previous employment and payment of contributions, are falling under Article 23 rather than Article 24 of the Convention.<sup>204</sup>

### 5.1.6 Travel Documents

In addition to Article 26 of the Refugee Convention that protects refugees' right to freedom of movement within their host country, Article 28 of the Convention obliges states to issue to refugees *lawfully staying* in their territory travel documents for the purpose of travel outside the territory. This obligation may be dispensed with if compelling reasons of national security or public order so require. While not in itself affecting the status of the holder as regards nationality, the issuance of a Convention Travel Document creates a presumption that the issuing state has, at least implicitly, recognised the holder as a refugee within the definition in Article 1 of the Convention.<sup>205</sup>

The travel document to which the refugee is entitled when having obtained lawful residence must be issued in accordance with the standard format set out in the Schedule to the Refugee Convention, including provisions on geographical and temporal validity (paragraphs 4 and 5), readmission to the issuing state (paragraph 13) and the responsibility of a new state of lawful residence to issue a new travel document under the terms of Article 28 of the Convention (paragraph 11). Furthermore, paragraph 16 of the Schedule makes it clear that the issuance of a refugee travel document under Article 28 of the Refugee Convention does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the issuing state and does not confer on these authorities a right of such protection.<sup>206</sup>

There seems to be no universal or regional human rights standard providing for similar protection of the right to a travel document, enabling travel outside the territory of a host state, for non-citizens. As regards refugees within the Refugee Convention definition who move to a new state of residence within Europe, the Council of Europe has laid down standards according to which the new state of

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<sup>204</sup> Cf. Paul Weis (ed.), *The Refugee Convention, 1951* (CUP 1995) 174 and 192; James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed., CUP 2021) 1020-22; Eve Lester, 'Article 23', in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) 1054.

<sup>205</sup> Cf. para 15 of the Schedule to the Refugee Convention, mentioned below. See also Jens Vedsted-Hansen, 'Article 28/Schedule', in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011) 1203 and 1212.

<sup>206</sup> For a different view, see Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th ed., OUP 2021) 585-6.

residence shall issue travel documents under certain conditions following a minimum period of residence in the new host country.<sup>207</sup>

## 6 CONCLUSIONS

The work of this paper has been primarily descriptive, cataloguing the range of instruments and principles protecting asylum seekers and refugees at both international and regional level. In so doing, the working paper provides a state-of-the-art overview of protective legal standards drawn from international and regional conventions on human rights and refugee instruments of great relevance to the implementation of the Global Compact on Refugees.

While the Global Compact on Refugees is, of course, a non-binding agreement, the binding international and regional standards presented here are the bedrock against which the GCR rests. While the extensive set of political commitments emerging from the inaugural Global Refugee Forum held may lead to the false impression that the objectives and principles underlying the GCR are optional or voluntary in nature, the standards outlined above demonstrate the grounding of the GCR in binding international human rights and refugee law.

In so doing, the working paper sought to catalogue those legal procedures and standards most closely connected to the grant and content of international protection. As a result, the working paper has presented the major international and regional instruments governing the international protection systems of the six major ASILE countries with respect to access to asylum, asylum procedures, scope of international protection and content of international protection. There are undoubtedly other elements of asylum governance in need of attention in future ASILE research, notably reception conditions and detention standards.

Moreover, while this working paper does refer to asylum governance in Bangladesh, Brazil, Canada, Jordan, South Africa and Turkey to some limited extent, further research is required in at least three respects: a) analysing the implementation of each country's international and regional obligations; b) comparing regional approaches to asylum governance in light of the GCR; and c) investigating the relationship between containment and mobility in each country's approach to asylum governance.

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<sup>207</sup> European Agreement on Transfer of Responsibility for Refugees, adopted 16 October 1980, entry into force 1 December 1980, CETS no. 107.



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## ASILE

Global Asylum  
Governance and  
the European  
Union's Role



Project has  
funding from the  
European Union's Horizon  
2020 research and innovation  
programme under grant  
agreement No 870787

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